

72-914 SUPREME COURT, U. S.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No.

Supreme Court, U. S.
FILED

DEC 21 1972

SARAH SCHEUER, Administratrix of the
of Sandra Lee Scheuer, Deceased,

FRANKEL RODAK, JR., CLERK

Petitioner,

v.

JAMES RHODES, SYLVESTER DEL CORSO,
ROBERT CANTERBURY, HARRY D. JONES,
JOHN E. MARTIN, RAYMOND J. SRP,
Various Officers and Enlisted Men,
and ROBERT WHITE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE	4
STATEMENT OF THE CASE	5
1. SUMMARY OF THE COMPLAINT	5
2. PROCEEDINGS BELOW	8
REASONS FOR ALLOWANCE OF THE WRIT	11
1. THE ELEVENTH AMENDMENT	11
2. EXECUTIVE IMMUNITY	13
3. REPUDIATION OF RULE 8, FED. R. CIV. P.	16
CONCLUSION	17

TABLE OF AUTHORITIES

Cases:

American Federation of State, County and Municipal Employees v. Woodward, 406 F.2d 137 (8th Cir., 1969).....	13
Anderson v. Nosser, 456 F.2d 835 (5th Cir. 1972)	5
Barr v. Mateo, 360 U.S. 564 (1959)	15
Bayer v. Chaloux, 288 F. Supp. 366 (N.D.N.Y. 1968)	13
Birnbaum v. Trussel, 347 F.2d 86 (2nd Cir. 1965)	14
Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971)	12, 14, 15
Board of Trustees of Arkansas A. & M. College v. Davis, 396 F.2d 730 (8th Cir.), cert. denied, 89 Sup. Ct. 401 (1968).....	13

(ii)

Cases, continued:

Brazier v. Cherry, 293 F.2d 401 (5th Cir.), cert. denied, 368 U.S. 921 (1961)	5
Carter v. Carlson, 447 F.2d 358, 365 (D.C. Cir. 1971) . . .	5, 14
Conley v. Gibson, 355 U.S. 41, 45-46 (1957)	16
Cruz v. Beto, 405 U.S. 319 (1972).	16
District of Columbia v. Carter, 40 U.S.L.W. 3314 (No. 71-564, Jan. 10, 1972).	5, 14
Dunn v. Blumstein, 405 U.S. 330 (1972).	12
Dunn v. Estes, 177 F. Supp. 146 (D. Mass. 1953)	14
Ex Parte Young, 209 U.S. 123 (1908)	11, 13
Ford Motor Co. v. Treasury Department of Indiana, 323 U.S. 459 (1944)	11
Georgia Railroad and Banking Co. v. Redwine, 342 U.S. 299 (1952)	11
Gilligan v. Morgan, No. 71-1553 (October 24, 1972).	7
Great Northern Insurance Co. v. Read, 322 U.S. 47, 50-51 (1944)	12
Gregoire v. Biddle, 177 F.2d 579 (2nd Cir. 1949).	15
Griffin v. Prince Edward County, 377 U.S. 218 (1964) . . .	11
Haines v. Kerner, 404 U.S. 518 (1972)	16
Howell v. Cataldi, 464 F.2d 272 (3rd Cir. 1972)	5
Jankins v. Averett, 424 F.2d 1228 (4th Cir. 1970)	5
Jenkins v. McKeithen, 395 U.S. 411, 423-424 (1969) . . .	16
Jobson v. Heine, 355 F.2d 129 (2nd Cir. 1965)	14
Jones v. Perrigan, 459 F.2d 81 (6th Cir. 1972).	14
Joseph v. Rowlen, 402 F.2d 367 (7th Cir. 1968)	14
Krause v. Rhodes (No. C70-544, N.D.O., E.D.), 71-1623, 6th Circuit	2

(iii)

Cases, continued:

McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968) . . .	14
Meredith v. Allen County War Memorial Hospital Ass'n., 397 F.2d 33 (6th Cir. 1968)	14
Miller v. Rhodes (No. C70-816, N.D.O., E.D.), 71-1623, 6th Circuit	2
Monroe v. Pape, 365 U.S. 167 (1961)	6, 12, 15
Morgan v. Rhodes, 456 F.2d 608 (6th Cir. 1972)	7
Pierson v. Ray, 386 U.S. 547 (1967)	15
Pope v. Williams, 193 U.S. 621 (1904)	12
Puckett v. Cox, 456 F.2d 233 (6th Cir. 1972)	6
Roberts v. Williams, 456 F.2d 819 (5th Cir.), cert. denied 404 U.S. 866 (1971), addendum to opinion, 456 F.2d 834 (5th Cir. 1972)	6
Scheuer v. Rhodes, et al., (N.D.O., E.D. No. C72-439, May 3, 1972)	6
Scolnick v. Winston, 219 F. Supp. 836, 840 (S.D.N.Y., 1963), aff'd. 329 F.2d 716 (2nd Cir. 1964)	13
Screws v. United States, 325 U.S. 91 (1945)	5, 12
Sostre v. McGinnis, 442 F.2d 178, 205 (2nd Cir. 1971)	13, 14
Spalding v. Vilas, 161 U.S. 483 (1896)	15
Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963)	5
Tenney v. Brandhove, 341 U.S. 367 (1951)	15
Whirl v. Kern, 407 F.2d 781 (5th Cir. 1968)	14
Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969)	13

Statutes:

42 U.S.C. Section 1983	3, 4, 5, 8, 13, 14, 15
28 U.S.C. Section 1343.	4

(iv)

United States Constitution:

Article I	15
Amendment 11	9, 10, 11, 15

Rules:

Rule 8, Federal Rules of Civil Procedure	3, 7, 16
Rule 12 (b), Federal Rules of Civil Procedure	8

Miscellaneous:

3 K.C. Davis, <i>Administrative Law Treatise</i> , Sec. 27.03	13
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
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Petitioners request that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming the Judgment of the United States District Court for the Northern District of Ohio, Eastern Division, which dismissed the Complaint in this action against all defendants.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported. It is included in the Appendix, *infra*,

at pp. 1a-69a. The decision of the Court of Appeals was rendered in this case and in *Krause v. Rhodes* and *Miller v. Rhodes* (No. 71-1623, 6th Cir.), which were consolidated for argument. The Opinion of Judge Weick is at p. 3a. The separate concurring opinion of Judge O'Sullivan is at p. 27a and the dissenting opinion of Judge Celebrezze is at p. 32a.

The opinion of the District Court has not been reported. It, too, was rendered in this case and in *Krause v. Rhodes* (No. C70-544, N.D.O., E.D.) and *Miller v. Rhodes* (No. C70-816, N.D.O., E.D.), which were decided together. The District Court's memorandum opinion and order is included in the appendix at p. 70a.

Because this case was decided on a motion to dismiss directed at the face of the complaint, its text is of particular importance in reading this petition. A copy of the complaint is included in the appendix at p. 83a-92a.

JURISDICTION

The date of the judgment of the United States Court of Appeals for the Sixth Circuit was November 17, 1972, which was also the date of entry. No motion for rehearing, or other application, has been filed which would extend the time of filing this petition.¹

This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to Title 28, United States Code, Section 1254(1).

¹Petitioner is informed that the plaintiffs in *Krause* and *Miller* have petitioned for reargument in the Court of Appeals.

QUESTIONS PRESENTED

1. Whether an action brought in a United States District Court under Section One of the Civil Rights Action of 1871, 17 Stat. 13, 42 U.S.C. Section 1983, against the Governor and other officers of the State of Ohio, which specifically charges each of the named defendant state officials with personal wrongdoing causing deprivation of Constitutionally secured rights, and which demands money damages from each individually, making no claim on the Treasury of Ohio or any public funds, is an action against the State of Ohio, thereby falling under the Eleventh Amendment's prohibition against suit of a State in a federal court.

2. Whether there is a doctrine of unqualified executive immunity which immunizes state officials from personal liability for deprivations of rights, privileges and immunities secured by the United States Constitution and, if so, whether, in an action brought under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983, against the Governor of Ohio, Adjutant General of the Ohio National Guard, officers and enlisted men of the Ohio National Guard and the President of a state university, such a doctrine mandates the outright dismissal of a complaint charging each with specific personal wrongdoings causing deprivations of constitutionally secured rights.

3. Whether a United States District Court, pursuant to Rule 8 of the Federal Rules of Civil Procedure, when deciding a motion to dismiss a complaint based solely on the sufficiency of its allegations, is required to take its allegations as true.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

1. United States Constitution, Amendment XI:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State

2. Section 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13, 42 U.S.C. Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. Jurisdiction in the United States District Court was premised upon 28 U.S.C. Section 1343(3) and (4), which provide:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

STATEMENT OF THE CASE

On May 4, 1970, Petitioner's decedent and daughter, Sandra Lee Scheuer, was killed on the campus of Kent State University, Kent, Ohio by a bullet fired by an Ohio National Guardsman who had been ordered to the campus by the Governor of Ohio. As a consequence of an investigation conducted thereafter by Petitioner's counsel, Petitioner commenced this action in the District Court on September 8, 1970.²

1. *Summary of the Complaint*

The first claim in this action is based upon Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. Section 1983. It charges that the defendants acted in concert and subjected the plaintiff's decedent to a deprivation of rights, privileges and immunities secured by the United States Constitution, specifying that the plaintiff's decedent, when shot by Ohio National Guard troops, was deprived of life without due process of law. The complaint is thus based upon the settled rule that one killed or injured by intentional, reckless, arbitrary or unjustified conduct of state officials is deprived of life or liberty, without due process of law,³ and that such a

²Because of the unusual procedural context of this case—a motion to dismiss was granted without any factual matter offered by the defendants—counsel for Petitioner has, of course, limited the statement of the case to the facts of record, primarily the complaint in this action.

³See, e.g., *Screws v. United States*, 325 U.S. 91 (1945); *Howell v. Cataldi*, 464 F.2d 272 (3rd Cir. 1972); *Anderson v. Nosser*, 456 F.2d 835 (5th Cir. 1972); *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971), cert. granted in part sub. nom. *District of Columbia v. Carter*, 40 U.S.L.W. 3314 (No. 71-564, Jan. 10, 1972); *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970); *Stringer v. Dilger*, 313 F.2d 536 (10th Cir. 1963); *Brazier v. Cherry*, 293 F.2d 401 (5th Cir.), cert. denied 368 U.S. 921 (1961).

deprivation is actionable at law under Section 1983.⁴

The defendants in this action were, at the time it was commenced, the Governor of Ohio, the Adjutant General of the Ohio National Guard and Assistant Adjutant General, three commissioned officers of the Ohio National Guard, unnamed officers and enlisted men of the Ohio National Guard,⁵ and the President of Kent State University. Following the conclusory allegation of deprivation of life without due process of law set forth above, the complaint proceeds to detail the charge as to each defendant with specific allegations of personal misconduct causally related to the death of plaintiff's decedent. Thus, Governor Rhodes is charged, *inter alia*, with ordering Ohio National Guard troops to break up lawful assemblies, permitting them to carry guns loaded with live ammunition and permitting them to shoot at

⁴See Circuit Court decisions cited in footnote 3, above. See also *Monroe v. Pape*, 365 U.S. 167 (1961). To the extent that the complaint might be read as charging, in part, negligent rather than intentional, conduct by state officials resulting in deprivation of life without due process of law, the cases cited in note 3, *supra*, likewise support such a theory. See also *Puckett v. Cox*, 456 F.2d 233 (6th Cir. 1972); *Roberts v. Williams*, 456 F.2d 819 (5th Cir.) cert. denied 404 U.S. 866 (1971), addendum to opinion, 456 F.2d 834 (5th Cir. 1972).

⁵The caption describes "various officers and enlisted men" and, in Paragraph 7 of the complaint it is alleged that their names "are not now known to plaintiff" but that they "will be joined . . . as soon as their names become known . . ." On May 3, 1972, plaintiffs filed a successor complaint, treated as a new action. *Scheuer v. Rhodes, et al.* (N.D.O., E.D. No. C72-439, May 3, 1972), naming certain additional National Guardsmen.

persons without justification, Complaint, para. 13(a).⁶ Defendants Del Corso and Canterbury, Ohio National Guard Generals, are charged, *inter alia*, in addition to permitting the use of loaded guns and permitting unjustified shootings, with ordering inadequately trained and incapable troops to engage in conduct which greatly increased the risk of shooting of innocent persons. Complaint, para. 13(b) and (c).

Defendants Jones, Martin and Srp, Ohio National Guard Officers, are charged, in the alternative, with having ordered troops to shoot at persons without legal justification or with having failed to restrain troops under their direct command from unlawful shootings. Complaint, para. 13(d). The unnamed National Guard troops and officers are charged, in substance, with having shot without legal justification or, in the alternative, pursuant to orders which were patently unlawful.

Finally, Defendant White is charged with reckless omission to act when his actions could have decreased the risk of shooting of innocent persons by the Ohio National Guard.⁷

⁶The Pleading pattern of the complaint, following the exhortation of Rule 8, Fed. R. Civ. P. to plead "a short and plain statement of the claim showing that the pleader is entitled to relief . . .," is to allege material facts. It purposely avoids detailed cataloguing of evidence as being inconsistent with the goals of Rule 8.

⁷An additional case filed in the District Court arising from the Kent shootings is *Morgan v. Rhodes*, 456 F.2d 608 (6th Cir. 1972), cert. granted sub. nom. *Gilligan v. Morgan*, October 24, 1972 (No. 71-1553). That case involves a basic claim that some of the conduct involved in this action, as well as other conduct, was unlawful and deprived persons, including plaintiff's decedent, of constitutionally protected rights. The wrongdoing of the state officials alleged in the *Morgan* complaint, however, extends over

In addition to the foregoing claim arising under 42 U.S.C. Section 1983, the complaint sets forth several pendent causes of action, based on the same facts, arising under the law of Ohio.

The *ad damnum* clause prays for "compensatory damages against all defendants, jointly and severally, in the amount of One Million Dollars (\$1,000,000.00) and for punitive damages in an amount which this Court determines is just and proper . . ." No damages are sought from the State of Ohio, its treasury or its property. Moreover, there is no known mechanism under the law of Ohio by which a judgment against the defendants would entitle the plaintiff to execution of judgment against the State of Ohio, its treasury or its property.

2. Proceedings below

Motions to dismiss pursuant to Rule 12(b), Fed. R. Civ. P., were filed in the district court on behalf of all named defendants on the ground that the action, although nominally against them as individuals, was, in fact, against the State of Ohio. No factual matter was offered by the defendants in support of the motions

the entire period of May 1-4, 1970, and the complaint raises factual issues, some of which are different from those in this action.

The complaint in *Morgan* is included in the appendix, commencing at p. 93a. It is included for comparative purposes primarily because Judge O'Sullivan, in his concurring opinion in the Court of Appeals, treated the presence of certain allegations in the *Morgan* complaint and their absence in *Scheuer* as evidence of "dissembling" and attempted to support dismissal on that basis. Comparison of the two complaints is enough to demonstrate that nothing in the *Morgan* allegations conflicts with those in *Scheuer* and vice versa.

other than copies of proclamations by the Governor of Ohio activating the Ohio National Guard and recording the fact of their having been ordered to active duty in Kent.⁸

Judge Connell granted the motion to dismiss, concluding that "[t]he Eleventh Amendment to the United States Constitution prohibits this Court from exercising jurisdiction in this case . . .",⁹ appendix at 92a. In the course of his opinion, Judge Connell "found",

The Governor of Ohio had determined in good faith that on the basis of the facts as they appeared that mob rule existed at Kent State University and this Court cannot substitute its position for that of the executive of the State of Ohio.

The question of emergency compels the Governor to act decisively in suppressing this most dangerous activity, and the citizens of Ohio so demand it. (Appendix at 80a).

Neither the good faith of the Governor of Ohio nor the demands of the citizens of Ohio were alleged in the complaint and, as stated above, no factual matter was offered by defendants to support any findings.

The appeal was heard by a panel of the Sixth Circuit consisting of Judges Weick and Celebrezze and Senior

⁸Copies of the Governor's orders can be found appended to Judge Weick's opinion in the Court of Appeals and are reproduced in the appendix at 23a.

⁹While no order of consolidation was ever made to consolidate this case with *Krause v. Rhodes* and *Miller v. Rhodes*, they were apparently all routed to Judge Connell by some mechanism not apparent to counsel. Thereafter, the Clerk of the Sixth Circuit continued to consolidation on appeal.

Judge O'Sullivan. Counsel for defendants attempted to limit the issue on appeal to the question of whether the Eleventh Amendment barred suit, stating, "The sovereign immunity of the State of Ohio, embodied in the Eleventh Amendment, is the only relevant consideration at issue."¹⁰

Judge Weick wrote the Court of Appeals' affirming opinion for himself and Judge O'Sullivan and held "that the actions against the Governor, the officers of the National Guard, and the President of Kent State University, are in substance and effect actions against the State of Ohio. Suits against the State are prohibited by the Eleventh Amendment." (Appendix at 20a). In addition, he held that, "the Governor, the officers of the Guard, and the President of Kent State University all have executive immunity" (*Ibid.*).

Judge O'Sullivan wrote a concurring opinion, finding that, for the defendants to have failed to do what they did "would have been dereliction of duty" (appendix at 30a) and that "[t]he pleadings presented to the District Judge were clearly contrived to hide rather than disclose the true background of the involved events . . ." appendix at 28a).

Judge Celebrezze dissented from the majority opinion in all respects (Appendix at 32a-69a).

¹⁰Brief of all Defendants-Appellees in Court of Appeals at p. 10, incorporated by reference in separate brief of Defendant Rhodes in Court of Appeals.

REASONS FOR ALLOWANCE OF THE WRIT

This case presents the most compelling of reasons for allowing the writ. The Court of Appeals has decided a basic issue of constitutional law in a manner in direct conflict with a consistent line of controlling decisions of this Court. Moreover, it has done so in a case of overriding public importance and done so in a manner discrediting to the entire judicial process.

1. *The Eleventh Amendment*

In 1908, this Court firmly established in *Ex Parte Young*, 209 U.S. 123 (1908), the basic tenet of our constitutional law that a state official who engages in conduct in violation of the United States Constitution loses any shield of immunity otherwise possessed by the State. *Ex Parte Young* has been consistently read by this Court as precluding the assertion by a state official that, since suit against the official affects the conduct of the State, the suit is actually against the sovereign. See, e.g., *Griffin v. Prince Edward County*, 377 U.S. 218 (1964); *Georgia Railroad and Banking Co. v. Redwine*, 342 U.S. 299 (1952); *Ford Motor Co. v. Treasury Department of Indiana*, 323 U.S. 459 (1944). *Ex Parte Young's* applicability to damage actions has been recognized by this Court at least since the case last cited, in which Justice Reed wrote for a unanimous Court,

Where relief is sought under general law from wrongful acts of State officials, the sovereign immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally. (citations omitted), 323 U.S. at 462.

See also *Great Northern Ins. Co. v. Read*, 322 U.S. 47, 50-51 (1944).

In this case, the Court of Appeals reasoned that since suit in cases like the present one could affect the conduct of State officials—for example, they could be intimidated from engaging in unconstitutional practices—the State was affected as sovereign.

Judge Celebrezze was certainly correct in asserting, in his dissenting opinion below that,

[T]o hold that the present suits against state officials under Section 1983 are barred by the Eleventh Amendment would in effect overrule the Supreme Court's holding in *Ex Parte Young* ... (appendix at 39a)¹¹

Moreover, this is not a case in which the Court of Appeals, perceiving a break in doctrine in this Court, or in the lower federal courts, justifiably departs from an aged precedent in the fair expectation that, were the question before this Court, it would no longer adhere to its precedent. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330 (1972), and cases cited at p. 333 n. 3 predicting demise of *Pope v. Williams*, 193 U.S. 621 (1904). On the

¹¹Actually a very credible argument can be made for the proposition that, even without the *Ex Parte Young* doctrine suit could be maintained in this case without running afoul of the Eleventh Amendment. The position rests on the proposition that a wrongdoing official acts with state authority but that the judgment does not run against the State. See, e.g. *Monroe v. Pape*, 365 U.S. 167 (1961); *Screws v. United States*, 325 U.S. 91 (1945). Cf. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The contrary result, however, cannot be reached without directly confronting the principle of *Ex Parte Young*. For a damage action is *a fortiori* allowed under the principle of *Ex Parte Young*.

contrary, the viability of *Ex Parte Young* has not seriously been questioned by this Court. See 3 K.C. Davis, *Administrative Law Treatise* §27.03 at 553. In addition, in the few recently reported cases in other lower federal courts in which the position relied on below was suggested it was rejected as untenable. See, e.g., *Sostre v. McGinnis*, 442 F.2d 178, 205 (2nd Cir. 1971); *Whitner v. Davis*, 410 F.2d 24 (9th Cir. 1969); *American Federation of State, County and Municipal Employees v. Woodward*, 406 F.2d 137 (8th Cir. 1969); *Board of Trustees of Arkansas A. & M. College v. Davis*, 396 F.2d 730 (8th Cir.), cert. denied 89 Sup. Ct. 401 (1968); *Bayer v. Chaloux*, 288 F. Supp. 366 (N.D. N.Y. 1968); *Scolnick v. Winston*, 219 F. Supp. 836, 840 (S.D. N.Y. 1963), affirmed 329 F.2d 716 (2nd Cir. 1964).

In short, the decision below can only be characterized as a flagrant rejection of binding precedent. It demands review by this Court.

2. Executive Immunity

Despite the fact that counsel for respondents in the Court below declined to rely on anything but their challenge to the district court's jurisdiction, Judge Weick's opinion relies on the alternative ground that all of the defendants sued were protected by an absolute executive immunity. The application of that doctrine to cases such as this would, of course, have an effect identical to the Court's Eleventh Amendment ground; it would for all practical purposes repeal Section One of the Civil Rights Act of 1871, 42 U.S.C. §1983 insofar as it authorizes damage actions against state officials.¹²

¹²In his concurring opinion, Judge O'Sullivan makes it quite clear that it is his purpose to cripple the Civil Rights Act. Appendix at 27a.

The Court of Appeals' executive immunity determination is in conflict with a consistent line of decisions in other circuits—and even in the Sixth Circuit—which adopt the position that a deprivation of a constitutionally secured right is more serious than a mere tort and therefore not subject to any immunity. See, e.g., *Carter v. Carlson*, 447 F.2d 358, 365 (D.C. Cir. 1971), cert. granted in part sub. nom. *District of Columbia v. Carter*, 40 U.S.L.W. 3314 (No. 71-564, Jan. 10, 1972); *Sostre v. McGinnis*, 442 F.2d 178, 205 n. 51 (2nd Cir. 1971) (en banc); *Jobson v. Heine*, 355 F.2d 129 (2nd Cir. 1965); *Birnbaum v. Trussel*, 347 F.2d 86 (2nd Cir. 1965); *Roberts v. Williams*, 456 F.2d 819 (5th Cir.), cert. denied, 404 U.S. 866 (1971), addendum 456 F.2d 834 (5th Cir. 1972); *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1968); *Jones v. Perrigan*, 459 F.2d 81 (6th Cir. 1972);¹³ *Meredith v. Allen County War Memorial Hospital Ass'n.*, 397 F.2d 33 (6th Cir. 1968); *Joseph v. Rowlen*, 402 F.2d 367 (7th Cir. 1968); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968).

To the extent that the decision below and dictum in a few other lower court cases suggest the applicability of executive immunity to actions under 42 U.S.C. §1983, see, e.g., *Dunn v. Estes*, 177 F. Supp. 146 (D. Mass. 1953), this would be an appropriate occasion for this Court to resolve the matter.¹⁴

¹³ Judge Weick's dissenting opinion in *Jones*, 359 F.2d at 84-85, when compared to his opinion in this case, demonstrates his refusal to adhere to *stare decisis* in his own circuit, as well as that laid down by this Court.

¹⁴ The claim of executive immunity to damage actions for deprivation of a constitutional right was before the Court in *Bivens v. Six Unknown Named Agents of the Federal Narcotics Bureau*, 403 U.S. 388 (1971), but was not decided because not considered

The primary reason for review as to this point, however, is that the Court of Appeals has placed the second leg of its holding on executive immunity in an effort to shore up its untenable position on the Eleventh Amendment. It would be a grave injustice to permit the Court of Appeals to insulate a basically lawless decision from review by adopting an alternative ground of

in the Court of Appeals. On remand, the Panel of the Second Circuit held the particular defendants not immune but, in a departure from its precedents cited *supra*, suggested that supervisory persons might be immune. 456 F.2d 1339 (2nd Cir. 1972).

There are no direct precedents in this Court. In *Barr v. Mateo*, 360 U.S. 564 (1959), four members of the Court concurred in Justice Harlan's opinion holding a federal agency head immune to suit for common law libel. Justice Black's fifth vote was premised on his antipathy to libel actions. The *Barr* opinion of Justice Harlan adopted the position of Judge Hand in *Gregoire v. Biddle*, 177 F.2d 579 (2nd Cir. 1949), cert. denied, 339 U.S. 949 (1950), applying absolute immunity to the Attorney General of the United States in a common law false imprisonment action. Of note as to *Gregoire* is the fact that the Civil Rights Act charge in *Gregoire* was invalid because the action was against federal officials. As a consequence, Judge Hand expressly refused to consider whether his decision was applicable in a Civil Rights Act case. Justice Harlan, who wrote *Barr*, has twice expressed himself as seeing deprivations of constitutional rights as different in kind and more serious than state law torts. *Monroe v. Pape*, 365 U.S. 167, 196 (1961) (concurring opinion). See also *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

The many circuit court decisions rejecting executive immunity under 42 U.S.C. Section 1983 primarily do so on the ground that, whereas legislative immunity had independent precedent in the "Speech and Debate" clause of Article I, see *Tenney v. Brandhove*, 341 U.S. 367 (1951), and judicial immunity has long-standing historical roots, see *Pierson v. Ray*, 386 U.S. 547 (1967), no suggestion of executive immunity appeared in American law until long after adoption of the Civil Rights Act of 1871. See *Spalding v. Vilas*, 161 U.S. 483 (1896).

decision which is itself against the great weight of authority.

3. *Repudiation of Rule 8, Fed. R. Civ. P.*

Of the three judges in the courts below who have voted against Petitioner's position on the law, two have expressly refused, in their opinions, to adhere to the long-standing rule that, in testing the sufficiency of a complaint, its allegations must be treated as true. See, e.g., *Cruz v. Beto*, 405 U.S. 319 (1972); *Haines v. Kerner*, 404 U.S. 518 (1972); *Jenkins v. McKeithen*, 395 U.S. 411, 423-424 (1969); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Judge Connell took the unusual step of finding "good faith" on allegations which could only be read as alleging bad faith. Judge O'Sullivan's refusal to treat the pleadings as true is even more passionate. He accuses counsel of "dissembling" and "contriving" to hide the true facts and comes very close to concluding, on the basis of "judicial notice," that the killings were justified.

On the basis of such unprincipled conduct, it would be a rejection of reality to engage in the presumption that the decision of Judge Connell and the vote of Judge O'Sullivan were not caused, at least in part, by their views of the facts. The record supports the fair inference—indeed it was placed there by the written opinions—that Petitioner has been denied a chance to prove her case because two judges prejudged the facts.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals. In addition, it is suggested that a summary reversal on the papers is appropriate, both because of the nature of the decision below and because of the fact that it has now been almost eighteen months since the district court dismissed the case, suspending pretrial discovery and retarding its progress.

Respectfully submitted,

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AND THE HISTORY OF THE

Nos. 71-1622-23-24

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 71-1622

ARTHUR KRAUSE, Administrator of the Estate of
ALLISON KRAUSE, deceased

Plaintiff-Appellant,

v.

JAMES RHODES, Governor of the State of Ohio,
and

SYLVESTER DEL CORSO, Adjutant General of
the Ohio National Guard,

and

ROBERT CANTERBURY, Brigadier General and
Assistant Adjutant General of The Ohio Na-
tional Guard,

Defendants-Appellees.

No. 71-1623

ELAINE B. MILLER, Administratrix of the Estate
of JEFFREY GLENN MILLER, deceased,

Plaintiff-Appellant,

v.

JAMES RHODES, individually and as Governor
of the State of Ohio, SYLVESTER DEL CORSO,
ROBERT CANTERBURY, HARRY D. JONES, JOHN
E. MARTIN, RAYMOND J. SRP, ALEXANDER
STEVENSON and VARIOUS OFFICERS AND EN-
LISTED MEN, true names presently unknown,
being members of G Company, 107th
Armored Cavalry Regiment and A Com-
pany, First Battalion, 145th Infantry Regi-
ment of the Ohio National Guard, and ROB-
ERT WHITE,

APPEALS from
United States
District Court
for the North-
ern District of
Ohio, Eastern
Division.

2 Krause, Admr., et al. v. Rhodes, et al. Nos. 71-1622-23-24

No. 71-1624

SARAH SCHEUER, Administratrix of the
Estate of SANDRA LEE SCHEUER, de-
ceased,

Plaintiff-Appellant,

v.

JAMES RHODES, Governor of the State
of Ohio,

and

SYLVESTER DEL CORSO, Adjutant Gen-
eral of the Ohio National Guard,

and

ROBERT CANTERBURY, Assistant Adju-
tant General of the Ohio National
Guard,

and

HARRY D. JONES, a Major of the Ohio
National Guard,

and

JOHN E. MARTIN, and RAYMOND
SRP, Captains of the Ohio National
Guard,

and

VARIOUS OFFICERS AND ENLISTED MEN,
members of G Company, 107th
Armored Cavalry Regiment and A
Company, First Battalion, 145th In-
fantry Regiment of the Ohio Na-
tional Guard,

and

ROBERT WHITE, President, Kent State
University,

Defendants-Appellees.

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 3

Before: WEICK and CELEBREZZE, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

WEICK, Circuit Judge. The Governor of Ohio called out the Ohio National Guard to suppress a riot in the City of Kent, Ohio, and on the campus of Kent State University. Two proclamations of the Governor with respect thereto are appended to this opinion. They were attached to motions to dismiss filed by certain defendants in the District Court. During the riot each of the plaintiffs' decedents, who were students at Kent State University, allegedly were shot and killed by one of the unnamed and unknown members of the National Guard. Their personal representatives filed separate actions in the District Court to recover a total of \$11,000,000 — damages against the Governor of Ohio, the Adjutant General, and the Assistant Adjutant General. Two of the suits named four officers and various unknown and unnamed officers and enlisted men of the National Guard. The two suits even named the President of Kent State University as a defendant, in one of which suits it was alleged that he recklessly, wilfully and wantonly omitted to take any action to control the troops on the campus, or to decrease the risk of injury to the students, and in the other suit he was charged with a conspiracy. The suits were brought under the Civil Rights Act, 42 U.S.C. §§ 1983, 1331, 1334, and also under the wrongful death statutes of Ohio, on the theory of pendent jurisdiction.

The complaints alleged generally and in conclusory terms that the defendants conspired to call out the National Guard and were guilty of wanton, wilful and negligent conduct when they knew or should have known that there was no cause or insufficient cause therefor; that the troops were not properly trained in the correct and reasonable use of weapons to suppress civil disorders; and that the troops were permitted to be armed with loaded weapons. It is alleged that as a result the decedents, who allegedly were not participating in

4 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

any way in a riot and were not negligent in any manner, were shot and killed.

The motions to dismiss were filed by the defendants Rhodes, Del Corso, Canterbury, Jones, Martin and Srp. These defendants were the only defendants who were served with process in the cases in the District Court, or who filed motions in the cases.

The theory of the motions to dismiss was that these suits, although nominally against the Chief Executive and officers of the State, in substance and effect were against the State of Ohio since they directly and vitally affected the rights and interests of the State in the performance of its highest function, namely, the suppression of riots or insurrection and the protection of the public.

It was on this theory and that of executive immunity that the District Court dismissed the actions and the plaintiffs have appealed.¹ We affirm.

Amendment XI of the Constitution of the United States provides:

"The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by the citizens of another State"

¹ Plaintiff Krause filed a similar suit against the State of Ohio in the Court of Common Pleas of Cuyahoga County, Ohio, which was dismissed on the ground of sovereign immunity. On appeal a divided Appellate Court reversed the Common Pleas Court and held that the State was amenable to suit and that the individual officers of the State had immunity. *Krause v. State*, 28 Ohio App.2d 1 (1971). In so holding the State Appellate Court did not follow a long line of decisions of the Supreme Court of Ohio, going back as far as 1840. Certiorari was granted by the Supreme Court of Ohio, and on July 19, 1972, the Supreme Court of Ohio reversed the Appellate Court, and held:

"The State of Ohio is not subject to suits in tort in the courts of this state without the consent of the General Assembly." (Syl. 1) (*Krause, Admr., Appellee v. State of Ohio, Appellant*, 31 Ohio St.2d 132 (1972) certiorari pending).

In a concurring opinion Justice Corrigan sharply criticized the Appellate Court for flouting the Supreme Court of Ohio opinions.

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 5

In *Ex Parte New York*, 256 U.S. 490 (1921), the Supreme Court held:

"That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given; not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification."

The Court made it clear that the applicability of the Eleventh Amendment "is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record." *Id.* at 500.

The general rule was stated in *Dugan v. Rank*, 372 U.S. 609 (1963), as follows:

"The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' *Land v. Dollar*, 330 U.S. 731, 738 (1947), or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' *Larson v. Domestic & Foreign Corp.*, *supra*, at 704; *Ex parte New York*, 256 U.S. 490, 502 (1921)."

Moyer v. Peabody, 212 U.S. 78 (1909), like the present case, was an action brought under the Civil Rights Act to recover damages against the former Governor of Colorado, the former Adjutant General of the National Guard of the same state, and a Captain of a company of the National Guard,

6 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

for an imprisonment of plaintiff by them while in office. In upholding the dismissal of the complaint on demurrer, Justice Holmes stated:

"In such a situation we must assume that he had a right under the state constitution and laws to call out troops, as was held by the Supreme Court of the State. The constitution is supplemented by an act providing that 'when an invasion of or insurrection in the State is made or threatened the Governor shall order the National Guard to repel or suppress the same.' Laws of 1897, c. 63, Art. 7, § 2, p. 204. That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief. If we suppose a Governor with a very long term of office, it may be that a case could be imagined in which the length of the imprisonment would raise a different question. But there is nothing in the duration of the plaintiff's detention or in the allegations of the complaint that would warrant submitting the judgment of the Governor to revision by a jury. It is not alleged that his judgment was not honest, if that be material, or that the plaintiff was detained after fears of the insurrection were at an end." (p. 84-85)

He further said:

"When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 7

of executive process for judicial process. See *Keely v. Sanders*, 99 U.S. 441, 446. This was admitted with regard to killing men in the actual clash of arms, and we think it obvious, although it was disputed, that the same is true of temporary detention to prevent apprehended harm. As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a state law authorizing the Governor to deprive citizens of life under such circumstances was consistent with the Fourteenth Amendment, we are of opinion that the same is true of a law authorizing by implication what was done in this case. As we have said already, it is unnecessary to consider whether there are other reasons why the Circuit Court was right in its conclusion. It is enough that in our opinion the declaration does not disclose a 'suit authorized by law to be brought to redress the deprivation of any right secured by the Constitution of the United States.' See *Dow v. Johnson*, 100 U.S. 158." (*Id.* at 85-86).

In *Sterling v. Constantin*, 287 U.S. 378 (1932), Chief Justice Hughes, in referring to *Moyer v. Peabody*, *supra*, stated:

"By virtue of his duty to 'cause the laws to be faithfully executed,' the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. *His decision to that effect is conclusive.* That construction, this Court has said, in speaking of the power constitutionally conferred by the Congress upon the President to call the militia into actual service, 'necessarily results from the nature of the power itself, and from the manifest object contemplated.' The power 'is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union.' *Martin v. Mott*, 12 Wheat. 19, 29, 30. Similar effect, for corresponding reasons, is ascribed to the exercise by the Governor of a State of his discretion in calling out its military forces to suppress insurrection and disorder. *Luther v. Borden*, 7 How. 1, 45; *Moyer*

8 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

v. Peabody, 212 U. S. 78, 83. The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace. Thus, in *Moyer v. Peabody*, *supra*, the Court sustained the authority of the Governor to hold in custody temporarily one whom he believed to be engaged in fomenting disorder, and right of recovery against the Governor for the imprisonment was denied. The Court said that, as the Governor 'may kill persons who resist,' he 'may use the milder measures of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief.' In that case it appeared that the action of the Governor had direct relation to the subduing of the insurrection by the temporary detention of one believed to be a participant, and the general language of the opinion must be taken in connection with the point actually decided. *Cohens v. Virginia*, 6 Wheat. 264, 399; *Carroll v. Carroll's Lessee*, 16 How. 275, 287; *Myers v. United States*, 272 U. S. 52, 142." (*Id.* at 399-400; emphasis added).

In *Gregoire v. Biddle*, 177 F.2d 579 (2nd Cir. 1949), which was an action under the Civil Rights Act for damages against federal officers for false arrest, Chief Judge Learned Hand who wrote the opinion for the Court said:

"It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as *res nova*, we should not hesitate to follow the path laid down in the books.

"The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be

10 *Krauss, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. For the foregoing reasons it was proper to dismiss the first count."

In *Barr v. Matteo*, 360 U.S. 564 (1959), Mr. Justice Harlan, who wrote the opinion for the Court, stated,

"The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties — suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government."

Justice Harlan then quoted the language of Learned Hand from *Gregoire v. Biddle*, hereinbefore set forth, and stated:

"We do not think that the principle announced in *Vilas* can properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy." (Footnotes omitted)

In *Tenney v. Brandhove*, 341 U.S. 367 (1951), the Court said in discussing legislative immunity:

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 11

"The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. See cases cited in *Arizona v. California*, 283 U.S. 423, 455."

Bradley v. Fisher, 80 U.S. 335 (1871), and *Alzua v. Johnson*, 231 U.S. 106 (1913), upheld judicial immunity even though acts were in excess of jurisdiction and were alleged to have been done corruptly and maliciously.

Although occasionally both legislators and judges have been charged with depriving individuals of their constitutional rights, they have unquestioned immunity from suit. *Gregoire v. Biddle*, *supra*, and *Barr v. Matteo*, *supra*, applied the immunity to the Executive Department for the same reasons that it was extended to legislators and judges. The Executive Department is charged with the duty of protecting not only the other two departments of government but also the general public from domestic as well as foreign enemies. Such protection is the highest duty the Executive Department is obligated to perform.² It would not be conducive to good government to require the Chief Executive of either the nation or the state to defend himself in court, in a multitude

² As well stated by Mr. Justice White, "The most basic function of any government is to provide for the security of the individual and of his property." *Miranda v. Arizona*, 384 U.S. 436, 539 (1966), White, J., dissenting.

12 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

of protracted actions, because he called out troops to suppress riots or disorders which resulted in injury. It would surely take a hardy executive to exercise his discretion by calling out troops to suppress a riot or insurrection, if he knew that in so doing the wisdom of his action could later be challenged in the courts. And since the courts have granted to themselves absolute immunity, it would seem incongruous for them not to extend the same privilege to the Executive.

To place a straightjacket on the state's Chief Executive in times of emergency so that he could not freely exercise his discretion, would indeed stop the state government "in its tracks." *Dugan v. Rank, supra*, at 621; *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 at 704 (1949); *Ogletree v. McNamara*, 449 F.2d 93 (6th Cir. 1971).

The suit against the state executives in this case, while not asking for a money judgment against the state, would seriously "interfere with public administration", would "restrain the Government from acting", and would "compel it to act". *Dugan v. Rank, supra*.

Ex Parte Young, 209 U.S. 123 (1908), relied upon by the appellants is inapposite. It was an action for injunction to prohibit a state attorney general from enforcing an unconstitutional state statute which fixed confiscatory rates and interfered with interstate commerce. Our case, on the other hand, is an action for damages and also involves the question whether the federal courts should interfere with the performance by the state's chief executive of his highest duty to suppress riots or insurrections and protect the public.

Article III, Section 10 of the Ohio Constitution provides that the Governor shall be Commander in Chief of the military and naval forces of the state except when they are called into service of the United States. Article IX Section 3 provides that the Governor has power to appoint the adjutant general, quartermaster general and other staff officers. Article IX Section 4 provides that he has the "power to call

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 13

forth the military to execute the laws of the state, to suppress insurrection, and repel invasion."

Pertinent provisions of Ohio statutes relating to the militia are as follows:

Ohio Revised Code, Section 5923.21,

"The organized militia may be ordered by the governor to aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia."

Ohio Revised Code, Section 5923.22,

"When there is a tumult, riot, mob, or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence break or resist the laws of the state, the commander in chief may issue a call to the commanding officer of any organization or unit of the organized militia, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authorities.

"No officer or enlisted man in the organized militia, shall refuse to appear at the time and place designated when lawfully directed to do so in conformity to the laws of the suppression of tumults, riots, and mobs, or shall fail to obey an order issued in such case."

Ohio Revised Code, Section 5823.37 (Supp.),

"When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."

Ohio Revised Code, Section 2923.55 (Supp.),

14 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

"Police officers, special police officers, sheriffs, deputy sheriffs, highway patrolmen, other law enforcement officers, members of the organized militia, members of the armed forces of the United States, and firemen, when engaged in suppressing a riot or in dispersing or apprehending rioters and after an order to desist and disperse has been issued pursuant to section 2923.51 of the Revised Code, are guiltless for killing, maiming, or injuring a rioter as a consequence of the use of such force as is necessary and proper to suppress the riot or disperse or apprehend rioters. This section does not relieve a member of the organized militia or armed forces of the United States from prosecution by court-martial for a military offense."

Kent State University is a state institution. Ohio Rev. Code § 3341.01. Its Board of Trustees is appointed by the governor with the advice and consent of the senate. Ohio Rev. Code § 3341.02(B).

Ohio has long applied the doctrine of sovereign immunity not only to suits against the state but also to its agencies and instrumentalities. *Board of Commissioners v. Mighels*, 7 Ohio St. 110 (1857); *Palmer v. State*, 96 Ohio St. 513 (1917); *Palumbo v. Industrial Commission*, 140 Ohio St. 54 (1942); *State ex rel. Williams v. Glander*, 148 Ohio St. 188 (1947); *Wolf v. Ohio State University Hospital*, 170 Ohio St. 49 (1959).

In *Glander*, the Court approved and quoted the following language from American Jurisprudence:

"While a suit against state officials is not necessarily a suit against the state, within the rule of immunity of the state from suit without its consent, that rule cannot be evaded by bringing an action nominally against a state officer or a state board, commission, or department in his or its official capacity when the real claim is against the state itself, and the state is the party vitally interested. If the rights of the state would be directly and adversely affected by the judgment or decree sought, the

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 15

state is a necessary party defendant, and if it cannot be made a party, that is, if it has not consented to be sued, the suit is not maintainable. The state's immunity from suit without its consent is absolute and unqualified, and a constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court."

Glander was approved and followed in *Krause v. State*, 31 Ohio St.2d 132, 134, 142 (1972) certiorari pending.

In *Palmer v. State*, 248 U.S. 32 (1918), which grew out of *Palmer v. State*, 96 Ohio St. 513 (1917), the Supreme Court held:

"The right of individuals to sue a State, in either a federal or state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State."

The State of Ohio has not consented to be sued in either the state or federal courts.³

Lower court cases holding that State universities are not amenable to suits in tort actions are:

Thacker v. Board of Trustees, 29 Ohio Misc. 33, following *Wolf v. Ohio State University Hospital*, 170 Ohio St. 49 (1959); *Carolyn v. Youngstown State University*, unreported, 7th Dist. Court of Appeals dismissed by Supreme Court of the United States, No. 71-569, 40 Law Wk. 3310.

In *Estate of Burks v. Ross*, 438 F.2d 230 (6th Cir. 1971),

³ While the Civil Rights Act (§ 1983) was recently held to be within an exception to the anti-injunction statute (28 U.S.C. § 2283) forbidding federal courts from issuing injunctions against state courts, *Mitchum v. Foster*, 407 U.S. 225 (1972), the Eleventh Amendment contains no exceptions. We ought not to engraft an exception on the Amendment by judicial construction.

we held that an Administrator of a Veterans Hospital and the institution's psychiatrist had executive immunity.⁴

In our judgment, President White had executive immunity. No possible claim for relief, other than in conclusory language, was stated against him.

Relative to the allegations in the complaint that the members of the National Guard were permitted to carry loaded weapons and that they were not properly trained for suppressing civilian riots and disturbances, it is clear that the judiciary ought not to involve itself in determining military or political questions. Our expertise does not extend to that field. We ought not to limit the Governor in the exercise of his discretion to call out the National Guard to suppress a riot or insurrection; neither should we tell the military not to carry loaded weapons to protect the troops when someone may shoot or throw rocks at them.

Bright v. Nunn, Governor, 448 F.2d 245 (6th Cir. 1971), involved a riot on the campus of the University of Kentucky at Lexington following the Kent State riots, during the course of which the ROTC building and several other buildings were destroyed by fire. An adjoining dormitory for women had to be evacuated in the middle of the night. Rocks were thrown at teachers, security officers, and a policeman. A meeting of the Board of Trustees was disrupted. Outside agitators were on the campus, some of whom were convicted felons, and one was an arsonist. The trouble in that case was that the Guard was not called out soon enough to prevent the destruction of property. When the Guard was finally called out

⁴ In *Martone v. McKeithen*, 413 F.2d 1373 (5th Cir. 1969), the Court, relying on *Barr v. Matteo*, *supra*, and *Gregoire v. Biddle*, *supra*, held that the Governor of the state has immunity from damage suits for acts within the sphere of executive activity; that the members of the Labor-Management Commission and four investigators on its staff had legislative immunity; and the grand jurors had judicial immunity. Officials of the Department of Justice also have immunity. *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964). Allegations of malice are not sufficient to prevent the application of executive immunity. *Pierson v. Ray*, 386 U.S. 547 (1967), is authority for the proposition that Section 1983 does not abolish the immunity of public officers from suit.

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 17

the disturbances were promptly quelled. The President of the student body, joined by the local chapter of the American Association of College Professors, brought a class action in behalf of the students and professors against the governor and the President of the University alleging that their rights of speech and assembly had been denied them by the presence of the troops on the campus, and they asked for declaratory relief determining the impropriety of such actions and an injunction against further invasion of their asserted rights. The District Court dismissed the complaint following an evidentiary hearing. We affirmed.

The federal government is inextricably involved with the states in the training and weaponry of the National Guard. The involvement is stated very well in the dissenting opinion of Judge Celebrezze in *Morgan v. Rhodes*, 456 F.2d 608 (6th Cir. 1972), wherein he said:

"I find a 'textually demonstrable constitutional commitment' of National Guard training and weaponry to a coordinate political department under Article I, Section 8, Clause 16, of the United States Constitution, which provides that Congress shall have the power

'To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.'

"Pursuant to this constitutional authority, Congress has enacted legislation which governs the training and weaponry of the National Guard. 32 U.S.C. §§ 501-07, 701. Moreover, Congress has expressly provided that

'The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.' 32 U.S.C. § 110.

And under 32 U.S.C. § 108, the President has available the following means by which to enforce any regulations which he or the Congress may prescribe for the National Guard:

'If, within a time to be fixed by the President, a State does not comply with or enforce a requirement of, or regulation prescribed under, this title its National Guard is barred, wholly or partly as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law.'

"The potential effectiveness of this sanction is evidenced by the fact that '[t]he Federal Government pays for 90 percent of the operating costs, virtually all of the equipment, and nearly half of the cost of the physical installations and facilities' of the National Guard. *Report of the National Advisory Commission on Civil Disorders* at 498 (Bantam ed. 1968)."

"This power to prescribe and enforce regulations for the training and weaponry of the National Guard, which Congress has delegated in part to the President, is more than a mere token and unexercised authority. In July of 1967, when civil disorders had come to the forefront of national concern, President Johnson announced that he had ordered the addition of special training courses to the existing National Guard training program. *Weekly Compilation of Presidential Documents*, Vol. 3, No. 30, at 1056 (1967). Moreover, under the authority delegated to the President, the Department of the Army has specifically set mandatory riot-control training requirements for all Army National Guard and certain Air National Guard units. See *Report of the National Advisory Commission on Civil Disorders*, *supra*, at 505.⁵

"I believe that the congressional and executive authority to prescribe and regulate the training and weaponry of the National Guard, as set forth above, clearly pre-

⁵ Presidents have called out troops to suppress disorders, enforce orders of the federal courts and even to prevent disorders at political conventions. It could hardly be maintained that the President of the United States is not protected with Executive immunity. (Footnote ours.)

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 19

cludes any form of judicial regulation of the same matters. I can envision no form of judicial relief which, if directed at the training and weaponry of the National Guard, would not involve a serious conflict with a

'coordinate political department; . . . a lack of judicially discoverable and manageable standards for resolving [the question]; . . . the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; . . . the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; . . . an unusual need for unquestioning adherence to a political decision already made; [and] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.' *Baker v. Carr*, *supra*, 369 U.S. at 217.

Any such relief, whether it prescribed standards of training and weaponry or simply ordered compliance with the standards set by Congress and/or the Executive, would necessarily draw the courts into a nonjusticiable political question, over which we have no jurisdiction."

It would appear that the United States was a necessary party to the determination of the issues as it was involved in the training of the National Guard and their use of weaponry. Failure to join an indispensable party requires dismissal of the action, Rules 12b and 19, Fed.R.Civ.P. Any decision rendered by the District Court relative to the training and weaponry of the Guard would require action to be taken by both state and federal governments. To require such action to be taken is beyond the jurisdiction of the Court. The United States has not consented to be sued.

It is obvious from a reading of the complaints that the plaintiffs do not know who fired the shots that resulted in the deaths of their decedents. In two of the complaints they have sued "Various Officers and Enlisted Men, true names

presently unknown, being members of G Company, 107th Armored Cavalry Regiment and A Company, First Battalion, 145th Infantry Regiment, of the Ohio National Guard." The two plaintiffs may not bring into court an entire regiment of troops merely by suing "various officers and enlisted men, true names presently unknown." The unnamed Officers and Enlisted Men were not served with process and were not properly before the District Court. It had no jurisdiction over them.

Furthermore, no relationship of respondeat superior existed between the unnamed enlisted men and the named and unnamed officers and the Governor of Ohio. The enlisted men, as well as the officers of the Guard, were all agents and servants of the State of Ohio.

The allegation of conspiracy, without stating any supporting facts, is a pure conclusion of law.

We hold that the actions against the Governor, the officers of the National Guard, and the President of Kent State University, are in substance and effect actions against the State of Ohio. Suits against the State are prohibited by the Eleventh Amendment. The Governor, the officers of the Guard, and the President of Kent State University all have executive immunity. The unnamed and unknown officers and enlisted members of the Guard, none of whom was served with process, were not before the District Court, and it had no jurisdiction over them.

THE DISSENT

With all due respect to our brother, we have difficulty in following his lengthy and labored dissenting opinion. We are unable to reconcile it with his partial dissent in the case of *Morgan v. Rhodes*, 456 F.2d 608 (6th Cir. 1972), wherein he stated rather clearly that the federal government was inextricably involved in the training and weaponry of the National Guard. (*Id.* at 618, *et seq.*). If this is true, the suit should also be against the Federal Government. The United

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 21

States is an indispensable party; there is a defect of parties. But, as we have pointed out, the Federal Government is not amenable to suit, and neither is the state.

According to the dissent, the constitutional rights of a citizen may even be violated flagrantly by legislators and judges, with impunity, because they have immunity. He relies on *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Pierson v. Ray*, 386 U.S. 547 (1967). See also *Bradley v. Fisher*, 80 U.S. 335 (1871); *Alzua v. Johnson*, 231 U.S. 106 (1913).

Where immunity exists, it cannot be defeated by allegations that the defendant acted maliciously. *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949); *Tenney v. Brandhove*, *supra*.

We think the dissent incorrectly applies Ohio law. In *State ex rel Williams v. Glander*, 148 Ohio St. 188 (1947), the Supreme Court of Ohio made it clear that the common law rule of immunity cannot be evaded by bringing a suit nominally against a state officer when the real claim is against the state itself. *Glander* was approved by the Supreme Court in *Krause v. State*, 31 Ohio St.2d 132 (1972), wherein the Court held that the state had not waived immunity with respect to the claim of one of the appellants in these appeals.

Nor do we agree with the dissent's interpretation of Ohio Revised Code § 5923.37 (Supp.) which states:

"When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."

This statute is in derogation of the common law of the state and must be strictly construed. *Lee Turzillo Contracting Co. v. Cincinnati Metropolitan Housing Authority*, 10 Ohio St. 2d 5 (1967). It must be read in *pari materia* with Sections

22 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

5923.21, 5923.22 and 2923.55 hereinbefore quoted, and must be considered in the light of *State ex rel Williams v. Glander, supra*.

It applies only when a *member* of the Guard is ordered to duty by state authority. In the present case the members of the Guard were ordered to duty by state authority, namely, the Governor of Ohio. The liability part of the statute thus applies only to the members of the Guard and not to the Governor, who was already protected by executive immunity without limitation thereon. Furthermore, there is no averment in the pleadings that the Governor was at the "scene" at the time of the shooting.

The officers of the Guard can be held liable only for their own conduct. They are not liable for negligence or willful and wanton conduct on the part of members of the Guard, as these members are agents of the state of Ohio and are not servants of the officers. The complaints do not state claims upon which relief can be granted.

It is also clear that the District Court had no jurisdiction of the diversity claim of Sarah Scheuer, as she is a resident of Ohio.

Not one Ohio case is cited in the dissent wherein the Governor, the officers or members of the Guard, have been held liable in a civil action for acts performed in the suppression of insurrection. They obviously are not responsible for any dereliction of the Federal Government in the training and weaponry of the Guard, in which it is inextricably involved; nor are they liable under Ohio law for negligence.

We ought not to deter the Chief Executives of either the state or the nation in the *unflinching* performance of their duty to protect the public, nor should we make their actions in this respect in times of emergency, subject to judicial review.

The Civil Rights Act, § 1983, cannot be engrafted on the Eleventh Amendment by judicial construction.

Affirmed.

APPENDIX**EXHIBIT I**

State of Ohio

EXECUTIVE DEPARTMENT

Office of the Governor

Columbus

PROCLAMATION

WHEREAS, in northeastern Ohio, particularly in the counties of Cuyahoga, Mahoning, Summit and Lorain, and in other parts of Ohio, in particular Richland, Butler and Hamilton Counties, there exist unlawful assemblies and roving bodies of men acting with intent to commit felony and to do violence to person or property in disregard of the laws of the State of Ohio and the United States of America; and

WHEREAS, said unlawful assemblies and bodies of men have by acts of intimidation and threats of violence put law-abiding citizens in fear of pursuing their normal vocations in the transportation industry; and

WHEREAS, local government officials, including sheriffs and their deputies and municipal police departments, are unable with their own forces to bring about a cessation of violence and reduce the believability of threats of violence; and

WHEREAS, troops of the Ohio National Guard, in coordination with the Ohio State Highway Patrol and local peace officers, can bring about a restoration of confidence in the ability of citizens to move freely in the conduct of their business over the streets and highways of the State; and

WHEREAS, the Mayors of many Ohio cities, after taking counsel with each other, have urgently requested that the Governor make available the troops of the Ohio National Guard to assist in maintaining order and in restoring freedom of transportation movement,

24 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

NOW, THEREFORE, I, JAMES A. RHODES, Governor and commander-in-chief of the militia of the State of Ohio, do hereby order into active service such personnel and units of the militia as may be designated by the Adjutant General to maintain peace and order and to protect life and property throughout the State of Ohio; and said Adjutant General, and through him the commanding officer of any organization of such militia, is authorized and ordered to take action necessary for the restoration of order throughout the State of Ohio. The military forces involved will act in aid of the civil authorities and shall consult with them to the extent necessary to determine the objects to be accomplished, leaving the procedure of execution to the discretion of the commanding military officer designated by the Adjutant General.

The Adjutant General shall provide all transportation, services, and supplies necessary for the militia; and all statutory provisions requiring advertisement for bids in relation to their procurement are hereby suspended.

I command all persons engaged in riotous and unlawful proceedings to cease and desist from such activities.

The active military duty herein ordered is hereby designated as service in a time of public danger.

This proclamation shall continue in force until revoked.

(SEAL OF OHIO)

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the Great Seal of the State of Ohio to be affixed at Columbus, this 29th day of April, in the year of our Lord, one thousand nine hundred and seventy.

/S/ James A. Rhodes
Governor

ATTEST:

Ted W. Brown
Secretary of State

EXHIBIT II

State of Ohio
EXECUTIVE DEPARTMENT
Office of the Governor
Columbus

PROCLAMATION

WHEREAS, on April 29, 1970, the Governor of Ohio as commander-in-chief issued verbal orders to the Adjutant General of Ohio directing him to call-up such units of the Ohio National Guard as in his judgment might be necessary or desirable to meet disorders and threatened disorders relating to wildcat strikes in the truck transportation industry, and to meet disorders or threatened disorders on campuses of Ohio State University in Franklin County, and campuses of other state-assited universities; and

WHEREAS, pursuant to Section 5923.231 of the Ohio Revised Code, the Governor of Ohio thereafter on April 29, 1970 issued his Proclamation ordering into active service such personnel and units of the militia as the Adjutant General might designate "to maintain peace and order and to protect life and property throughout the State of Ohio;" and

WHEREAS, pursuant to the verbal orders aforementioned, the Adjutant General of Ohio called to active service units of the Ohio National Guard and assigned them variously to service in the City of Kent and on the campus of Kent State University in Portage County, and on the campus of Ohio State University in Franklin County. In addition to divers specific assignments related to restoration of order in the truck transportation industry; and

WHEREAS, it is desirable to make a written record, both events and the derivation of authority exercised by personnel and units of the Ohio National Guard in Portage County and Franklin County.

26 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

NOW, THEREFORE, I, JAMES A. RHODES, Governor and commander-in-chief of the militia of the State of Ohio, do hereby supplement my Proclamation of April 29, 1970, by specifying that personnel and units of the militia as may or may have been designated by the Adjutant General to maintain peace and order in the City of Kent and on the campus of Kent State University in Portage County, and on the campus of Ohio State University in Franklin County, are included in the call to active service hereinbefore referred to; and said Adjutant General and through him the commanding officer of any organization of said militia is and was ordered to take action necessary for the restoration of order in the city and on the campuses aforesaid. The military forces involved are and were ordered to act in aid of the civil authorities, and the Adjutant General was directed to consult with them to the extent necessary to determine the object to be accomplished, leaving the procedure of execution to the discretion of the commanding military officer designated by the Adjutant General.

The active military duty herein further delineated is again designated as service in time of public danger.

This Proclamation shall continue in force until revoked with my Proclamation of April 29, 1970.
(SEAL OF OHIO)

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the Great Seal of the State of Ohio to be affixed at Columbus, this 5th day of May, in the year of our Lord, one thousand nine hundred and seventy.

/S/ James A. Rhodes
Governor

ATTEST:
Ted W. Brown
Secretary of State

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 27

O'SULLIVAN, Senior Circuit Judge, concurring. I concur in the opinion of Judge Weick, but I think it right to say this much more. The dissenting opinion states:

"The burden upon state officials to defend these suits — the nonmeritorious as well as the meritorious — is but a small price to pay for the protection of constitutional rights."

I cannot agree that what is being done in this case — suing all of the defendants, from the Governor of Ohio to the private soldiers of the Guard, in their *individual* capacities — "is but a small price to pay for the protection of constitutional rights." To escape the immunities which protect the state from suit, plaintiffs here seek to cast heavy burdens upon public officials and servants to pay out of their own pockets to provide for their defense for having sought, as their duties commanded, to protect those endangered by lawlessness.

In this case, we deal again with the ever-widening employment of Section 1983 for a purpose "not plainly apparent from its language,"¹ as such language was employed by the Congress when it adopted the Section in 1871 to combat some of the wrongs of our post-Civil War society. Currently, however, many courts have provided Section 1983 with new uses and much popularity — crowding today's courts with such volume of claimed causes of action as to seriously impair the judiciary's ability to meet its total burden of protecting American society.²

The dissent charges that the majority opinion "constitutes judicial repeal of an act of Congress." Certainly neither this Court nor any other has authority to repeal the Acts of Congress. Neither have we the right to amend the Acts of Congress by finding purposes in them outside the obvious Congressional intention in enacting them.

¹ 82 Harvard Law Review 1486 (1969).

² Younger, *State v. Uncle Sam*, 58 A.B.A. J. 155 (1972).

28 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

The pleadings in the case before us, except by extravagant conclusional allegations and some dissembling, strive to avoid threshold dismissal. The complaints, with apparent deliberateness, omit any mention of what had been taking place on the campus of Kent State University that occasioned the presence there of the Ohio National Guard. The dissent asserts that the Guard was called to active duty on the day of the events here involved "to protect against violence arising from a wild-cat strike in the truck transportation industry," but fails to mention that the Governor's May 5 Proclamation mentioned that the Guard's activation, by Proclamation of April 29, was also "to meet disorders or threatened disorders on the campuses of Ohio State University and campuses of other state-assisted Universities."

The pleadings would give the impression that the Ohio National Guard was on the Kent State campus for no reason whatever. It is asserted that the Governor's orders "obviously do not" have any relationship to the conditions prevailing on the Kent State campus. Thus, the pleaders would leave it that the Guard had no reason for being at Kent; that the Governor of Ohio with his soldiers entered upon the peace and quiet of Kent State campus as invaders, bent on killing innocent girls and boys.

It is charged that we — the majority — ignore the "wrongful death actions which are joined with the Section 1983 claims" because we fail to consider the complaint's allegations charging the Governor with "willful and wanton" killing of innocent young people. This writer does not hesitate to label such pleadings obvious contrivances to get into court without pretense of fair averment of causes of action.

The complaints, with transparent purpose, omit any mention of what had taken place in the City of Kent and on the campus of Kent State University. These are some of the allegations:

"At all times herein mentioned all defendants *acted and conspired* under color of statutes, ordinances, regulations,

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 29

customs and usages of the State of Ohio." (Emphasis supplied.)

"Defendants ordered troops which they knew were equipped with guns loaded with live ammunition onto the Campus of Kent State University at a time when:

(a) *Defendants knew there was no cause, or insufficient cause, for sending armed troops at said time into said place;*" (Emphasis supplied.)

"Suddenly and without warning and without cause or justification, National Guard troops fired live ammunition at a large group of students and people, *intentionally, willfully, wantonly and maliciously* disregarding the lives and safety of students, spectators, passers-by * * * including Allison Krause, who was wounded by a bullet fired by a weapon of a national guardsman, * * *." (Emphasis supplied.)

"All acts herein mentioned *were done individually and in conspiracy* by these defendants and by other unknown persons with *the specific intent of depriving plaintiff and plaintiff's decedent of their rights* to Due Process of Law and to Equal Protection of the Laws, and these acts were all done by all defendants and other unknown persons under color of statutes, ordinances, regulations, customs and usages of the State of Ohio." (Emphasis supplied.)

The pleaders then go on to ask One Million Dollars compensatory damages and Five Million Dollars punitive damage. In another of the complaints, the pleaders ask Two Million Dollars compensatory and Two Million Dollars punitive damages.

We search in vain for anything in the several plaintiffs' pleadings to tell us what reason, pretentious or otherwise, caused the defendant President of Kent State and the Mayor of the City of Kent to ask the Governor of Ohio to order the Ohio National Guard to the scene of the tragedies we deal with here. A fair reading of plaintiffs' pleadings dis-

30 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

closes an attempt to aver that, without any precedent events or causes, the Governor of Ohio *willfully and wantonly* ordered a company of the Ohio National Guard onto the Kent State campus, whose officers and men then *proceeded deliberately and without cause to kill the several plaintiffs' decedents*. The dissembling in plaintiffs' pleadings in this regard is portrayed by this Court's opinion in *Morgan v. Rhodes*, 456 F.2d 608. Such suit involved the events of April and May, 1970, on the campus of Kent State.

"At the outset, this complaint concedes that there was disorder which had not been terminated by normal civilian controls and that such disorders were continuing as of the time the Governor called out the troops. The complaint says:

'10. On or about May 1, 1970, there occurred certain disorders in the area of the Kent campus which resulted in the imposition of a curfew by the mayor of Kent. Thereafter, demonstrations and disorders continued in and about the Kent campus.'" 456 F.2d at p. 610.

I believe also that what had been going on at Kent State and its environs preceding the tragic deaths of these young people is so widely and publicly known across the nation that this Court may take judicial notice of such events. 8 Cyc. Fed. Proc. § 26.226 (3rd ed. 1968). The pleadings make no mention of the burning down of the ROTC Building on the campus of the University and the continued threats to persons and property — all a part of a state of insurrection that preceded and continued up to the very instant of the tragedy with which we deal. None of these things are even alluded to in the pleadings. For the Governor of Ohio to have refused to send the National Guard to the scene of these events and for the Guard and its men to have refused to deal with the situation confronting them, would have been dereliction of duty.

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 31

The pleadings presented to the District Judge were clearly contrived to hide rather than disclose the true background of the involved events — an attempt to predicate causes of action without disclosing their true subject matter. All of the foregoing confirms my belief that the pleadings do not disclose causes of action under Section 1983, and that this is not a case in which to fashion new rules to strike down traditional immunities.

32 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

CELEBREZZE, Circuit Judge, dissenting. With due respect for my Brothers of the majority, I am unable to concur in their opinion or the result reached thereunder.

The majority concludes that the present suits are "in substance and effect actions against the State of Ohio" within the prohibition of the Eleventh Amendment. As discussed in Part II of this dissent, however, I find no authority to support such an extension of the Amendment, nor do I understand the majority's disregard for the Supreme Court's ruling in *Ex parte Young*, 209 U.S. 123 (1908). Indeed, the majority's ad hoc application of the Eleventh Amendment would appear to bar all suits under 42 U.S.C. § 1983, with its requirement that defendants thereunder be shown to have acted under color of state law.

The majority concludes that the present suits are also barred by the common law doctrine of executive immunity. The majority is totally oblivious to the fact, as discussed in Part III of this dissent, that this conclusion in effect constitutes judicial repeal of an act of Congress in deference to a common law rule which emerged after the enactment of Section 1983.

The majority reads *Moyer v. Peabody*, 212 U.S. 78 (1909), as giving a governor and National Guardsmen total immunity from any form of judicial review of their actions. As discussed in Part IV of this dissent, the majority thus ignores not only the good faith requirement which was established by stipulation in the *Moyer* decision, but also the holding of *Sterling v. Constantin*, 287 U.S. 378 (1932), that the courts can and must review allegations that the actions of a governor and National Guardsmen have exceeded the range of permitted, discretionary conduct justified by the exigencies of the situation.

The majority totally ignores the wrongful death actions which are joined with the Section 1983 claims in each of the complaints. As discussed in Part V of this dissent, the wrongful death actions in the *Krause* and *Miller* complaints are asserted under original, diversity jurisdiction — rather than

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 33

pendent jurisdiction, to which the majority makes a passing reference — requiring that these actions be disposed of under the applicable Ohio common law and statutes. While it quotes one of these statutes, O.R.C. § 5823.27, in full, the majority fails to consider the fact that the present complaints specifically allege willful and wanton misconduct within the exception to the immunity granted under that statute.

Apart from these aspects of the majority opinion which I will discuss at some length in the remaining portions of this dissent, the majority has failed to recognize the status of these suits and the precedential effects of their ill-advised pronouncements. These suits were dismissed for lack of jurisdiction without an answer to the complaints and without any evidence having been introduced by either party — save two proclamations issued by Defendant-Appellee Governor Rhodes, the first of which orders Ohio National Guardsmen to active duty to protect against violence arising from a wild-cat strike in the truck transportation industry and the second of which was issued one day after the date of the deaths for which recovery is sought in the present suits. Even if these proclamations served as evidence of the conditions which prevailed on the Kent State Campus when the deaths occurred — which they obviously do not — they could not stand as conclusive proof of necessity in view of the Supreme Court's discussion in *Sterling v. Constantin*, 287 U.S. 378, 402-03 (1932). The majority opinion is nonetheless framed under the assumption that the violence and riotous conditions which, according to the media, may have prevailed on the Kent State Campus, have been established as proven facts for purposes of the present suits.

The shallowness of the majority's reasoning is illustrated in part by their reliance on this Court's decisions in *Bright v. Nunn*, 448 F.2d 245 (6th Cir. 1971), and *Morgan v. Rhodes*, 456 F.2d 608 (6th Cir. 1972), *cert. granted sub nom., Gilligan v. Morgan*, No. 71-1553, 41 U.S.L.W. 3221 (U.S. Oct. 24, 1972) (in which I dissented because no injunctive relief or de-

34 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

claratory judgment could have been granted), undaunted by the fact that those suits were against defendants comparable to those named in the present cases yet jurisdiction over the *Bright* and *Morgan* suits was in no way precluded by either the Eleventh Amendment or the common law doctrine of executive immunity.

No less than my Brothers of the majority, I recognize the considerations which weigh against judicial review of the conduct of state officials and National Guardsmen in the face of civil disorders and sudden emergencies — when the latter conditions are proven. Unlike the majority, I believe that these considerations can be given appropriate weight without totally barring judicial review of possibly unwarranted deprivations of constitutional rights — particularly when the majority can sustain its position only by resorting to an unsupportable extension of the Eleventh Amendment and an impermissible application of the common law doctrine of executive immunity. As discussed in Part IV of this dissent, the Supreme Court's opinion in *Sterling v. Constantin*, 287 U.S. 378 (1932), establishes workable guidelines for judicial review in this area which neither permit the courts to substitute their retrospective judgment for that of state officials acting in good faith in the face of an emergency nor require that the courts totally close their doors to claimed deprivations of constitutional rights when it is asserted that state action exceeded the limits of discretionary conduct justified under the circumstances.

I believe that the errors of the majority become self-evident from the following review of the suits and discussion of the issues raised by the rulings of the District Court and the majority opinion herein.

I.

These are appeals from the District Court's dismissal of three suits for damages under 42 U.S.C. § 1983. Each of the complaints also asserts a state law claim for wrongful death. Because the appeals involve the same questions of law, they

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 35

were heard as companion cases under Rule 7(b) of this Court.

The suits were brought by the representatives of the estates of Allison Krause, Jeffrey Glenn Miller, and Sandra Lee Scheuer, who died as a result of gunshot wounds allegedly inflicted by members of the Ohio National Guard on the Kent State University Campus on May 4, 1970. The complaints, which were filed separately during the months of July through September, 1970, each named James Rhodes, Governor of the State of Ohio, Sylvester Del Corso, Adjutant General of the Ohio National Guard, and Robert Canterbury, Assistant Adjutant General of the Ohio National Guard, as defendants. The Miller and Scheuer complaints also named as defendants Harry D. Jones, a major in the Ohio National Guard, John E. Martin and Raymond J. Srp., captains in the Ohio National Guard, various unnamed officers and enlisted men of the Ohio National Guard, and Robert White, President of Kent State University. The Miller complaint alone named Alexander Stevenson, a member of the Ohio National Guard, as an additional defendant.

The complaints assert that the decedents, Allison Krause, Jeffrey Glenn Miller, and Sandra Lee Scheuer, were enrolled as students at Kent State University in May 1970 and that none of the decedents was engaged in any riotous, violent, or provocative conduct at the time the fatal wounds were inflicted on May 4, 1970.

Although the defendants named in the three complaints are not identical and the allegations contained in the complaints vary somewhat as to the specific conduct challenged, those allegations can be generally summarized as follows: (1) Governor Rhodes intentionally, willfully, wantonly and recklessly ordered Ohio National Guard troops to duty on the Kent State campus when such action was unnecessary; permitted the troops to carry loaded weapons, thus increasing the risk that innocent persons would be injured and killed; permitted the troops to shoot at persons without justification;

36 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

and ordered the troops to break up all assemblies, whether lawful or unlawful; (2) Adjutant General Del Corso and Assistant Adjutant General Canterbury intentionally, willfully, wantonly and recklessly caused and ordered inadequately trained and incapable Ohio National Guard troops to carry loaded weapons, thus increasing the risk of shooting innocent persons; to shoot at persons without legal justification; and to engage in actions which increased the risk of injury and death to persons on and near the Kent State campus; (3) Major Jones and Captains Martin and Srp intentionally, willfully, wantonly and recklessly caused and ordered Ohio National Guard troops to shoot at and in the direction of persons without legal justification and to engage in actions which increased the risk of injury and death to persons on or near the Kent State campus; or, alternatively, these defendants intentionally, willfully, wantonly and recklessly failed to restrain the troops under their command from shooting and causing others to shoot, without legal justification, at and in the direction of persons on and near the Kent State campus; (4) the unnamed Ohio National Guard members willfully, wantonly and recklessly shot at and in the direction of persons on the Kent State campus without legal justification and caused others to do so; or, alternatively, if these unnamed Guardsmen were ordered to shoot their weapons, such orders were patently unlawful and did not legally justify such shooting; (5) President White intentionally, willfully, wantonly and recklessly failed to take any actions to control the Ohio National Guard activities on the Kent State campus or to decrease the risk of injury and death when such actions could have decreased that risk.

It is further asserted that the conduct of the Defendants-Appellees, as set forth above, was undertaken individually and in concert under color of state law, in deprivation of the decedents' rights to due process and equal protection, and that Plaintiffs-Appellants are therefore entitled to compensatory and punitive damages under 42 U.S.C. § 1983. The same conduct of Defendants-Appellees is asserted as the basis for

compensatory and punitive damages under the state wrongful death claims.

In a single Memorandum and Order, the District Court granted Defendants-Appellees' motions to dismiss the three suits under Rule 12(b)(1), F.R.C.P., for lack of subject matter jurisdiction. The District Court made the following findings and conclusions in support of its dismissal:

"The Eleventh Amendment to the United States Constitution prohibits this court from exercising jurisdiction in this case and this court so finds.

"All defendants, including President White, are sued in their official capacities and sovereign immunity so extends."

II.

The federal claim in each of the three complaints is asserted under 42 U.S.C. § 1983, which provides as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Emphasis added.)

Acknowledging that the complaints asserted claims against the individual defendants under Section 1983, the District Court nonetheless ruled that because each of the several defendants was being sued in his representative capacity as a public or military official and/or an agent of the sovereign State of Ohio, the suits were "essentially against the State of Ohio." The State of Ohio having failed to consent to such actions against it, the District Court concluded that the suits are barred by the Eleventh Amendment. This conclusion and the majority's endorsement of it are in direct conflict with the applicable case law.

In *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court was faced with contentions, similar to those of Defendants-Appellees here, that a suit in federal court against a state official was in essence a suit against the state, which was barred by the Eleventh Amendment. There a federal Circuit Court had enjoined the Attorney General of the State of Minnesota from instituting any action or proceeding to compel obedience to, or compliance with, a Minnesota statute or to enforce the remedies and penalties thereunder, pending the Court's ruling on the constitutionality of the statute. The Supreme Court ruled that the Eleventh Amendment did not bar the Circuit Court's injunction against the state attorney general, notwithstanding the fact that he was sued in his capacity as a state official:

"If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." 209 U.S. at 159-60.

Through its decision in *Ex parte Young*, the Supreme Court resolved what might otherwise have stood as a conflict between the Eleventh Amendment and suits in a federal court by citizens seeking to vindicate their rights under the Fourteenth Amendment. As was recently noted by Mr. Justice Brennan, the *Young* decision — coupled with what are now 42 U.S.C. § 1983 and 28 U.S.C. §§ 1343(3), 1331 — firmly established the federal courts as the primary guardians against state interference with constitutional rights:

"*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh

Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution. During the years between [*Osborn v. United States Bank*, 9 Wheat. 738 (1824)] and *Young*, and particularly after the Civil War, Congress undertook to make the federal courts the primary guardians of constitutional rights The principal foundations of the expanded federal jurisdiction in constitutional cases where the Civil Rights Act of 1871, 17 Stat. 13, which in § 1 empowered the federal courts to adjudicate the constitutionality of actions of any person taken under color of state statute, ordinance, regulation, custom, or usage, see 42 U.S.C. § 1983, 28 U.S.C. § 1343(3), and the Judiciary Act of 1875, 18 Stat. 470, which gave lower federal courts general federal-question jurisdiction, see 28 U.S.C. § 1331. These two statutes, together, after 1908, with the decision in *Ex parte Young*, established the modern framework for federal protection of constitutional rights from state interference. That framework has been strengthened and expanded by subsequent acts of Congress and subsequent decisions of this Court." *Perez v. Ledesma*, 401 U.S. 82, 106-07 (1971) (Brennan, J., concurring in part, dissenting in part).

The District Court's determination that the present suits under Section 1983 are barred by the Eleventh Amendment cannot be upheld in the face of the Supreme Court's decision in *Ex parte Young*. No less than the suits for injunctive relief which were before the Circuit Court in *Young*, the present actions under Section 1983 seek redress of asserted infringements of constitutional rights by state officials. To hold that the present suits against state officials under Section 1983 are barred by the Eleventh Amendment would in effect overrule the Supreme Court's holding in *Ex parte Young* and destroy Section 1983 as a tool by which federal courts are to guard against state interference with constitutional rights.

In its opinion in *Ex Parte Young*, *supra*, 209 U.S. at 150-52 the Supreme Court reviewed the scope of the Eleventh Amendment as it had then been construed. Clearly a citizen's suit

in which a state is a named party cannot be entertained by a federal court. See *Osborn v. United States Bank*, 9 Wheat. 738, 846, 857 (1824). Nor may a federal court hear a suit by a citizen against a governor or other state officer, in his official capacity, for moneys in the state treasury, *Governor of Georgia v. Madrazo*, 1 Pet. 110, 122, 123 (1828). And a citizen's suit against state officials, where the relief sought would require the state's specific performance of a contract, is likewise barred by the Eleventh Amendment in the absence of the state's consent. *Hagood v. Southern*, 117 U.S. 52, 67 (1886); *In re Ayers*, 123 U.S. 443 (1887).

The cases relied upon by the District Court in support of its conclusion that the present suits are barred by the Eleventh Amendment clearly fall within the above categories. The District Court based its ruling on the following cases: *Missouri v. Fiske*, 290 U.S. 18 (1933) (ancillary and supplemental bill seeking an injunction against a state, in its own name, restraining it from prosecuting proceedings in a state court); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945) (suit against a state agency for the refund of taxes from the state treasury); *Great Northern Ins. Co. v. Read*, 322 U.S. 47 (1944) (suit against a state insurance commissioner to recover taxes from the state treasury); *Louisiana v. Jumel*, 107 U.S. 711 (1882) (suit against state officials to require specific performance of contracts with the state and appropriation of state treasury funds); *Parden v. Terminal Railway Co.*, 377 U.S. 184 (1964) (FELA suit against a state agency for damages to be paid from the state treasury; state's operation of an interstate railway constituted consent to such a suit.)¹ Likewise, *Ex parte New York*, 256 U.S. 490 (1921) — the only Eleventh Amendment case cited as support for

¹ The District Court also cited *Fitts v. McGhee*, 172 U.S. 516 (1899), in support of its application of the Eleventh Amendment. As noted by the Supreme Court in *Ex parte Young*, *supra*, 209 U.S. at 156-57, however, the *Fitts* decision rested upon the plaintiff's invalid attempt to test the constitutionality of a state statute by naming as defendants state officials who had no power to enforce the statute in question.

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 41

the majority's holding — involved an attempt to join the New York Superintendent of Public Works as a defendant in three admiralty suits, under which any judgment would be satisfied out of the property or treasury of the State.

In several of these cases the Supreme Court expressly acknowledged that it was *not* faced with a suit against a state official under his personal liability for his wrongful acts:

"The ancillary and supplemental bill is brought by the respondents directly against the State of Missouri. It is not a proceeding within the principle that suit may be brought against state officers to restrain an attempt to enforce an unconstitutional enactment. That principle is that the exemption of States from suit does not protect their officers from personal liability to those whose rights they have wrongfully invaded." *Missouri v. Fiske, supra*, 290 U.S. at 26.

"In such cases [where relief is sought under general law from the wrongful acts of officials] the immunity of the sovereign does not extend to wrongful individual action and the citizen is allowed a remedy against the wrongdoer personally." *Great Northern Insurance Co. v. Read, supra*, 322 U.S. at 51.

"Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally." *Ford Motor Co. v. Department of Treasury of Indiana, supra*, 323 U.S. at 462.

The present actions under Section 1983 are not against the State of Ohio as a named defendant; they do not seek money damages from the State's treasury; nor would the requested relief, if granted, require specific performance of a contract by the State. Rather, these actions are brought against the named defendants, as individuals, under their personal liability for conduct which allegedly deprived Plaintiffs-Appellants' decedents of their constitutional rights. The suits are

of the type which the Supreme Court was careful to exclude from the Eleventh Amendment's prohibition in the cases discussed above and in its landmark decision in *Ex parte Young*.

Summarily dismissing the Supreme Court's decision in *Ex parte Young* as "inapposite" and ignoring the scope ascribed to the Eleventh Amendment by the above cases, the majority holds that the "nature and effect" of the present suits bring them within that Amendment's prohibition. The majority fails to consider that a comparable "nature and effect" is a prerequisite for any suit under Section 1983, with its requirement that defendants thereunder be shown to have acted under color of state law. Any question of Section 1983's constitutionality which thus emerges from the majority's approach, is averted by the fact that Section 1983 provides for redress against persons under their personal liability, and suits thereunder are theretofore not within the established scope of the Eleventh Amendment. See *Sostre v. McGinnis*, 442 F.2d 178, 205 (2d Cir. 1971).

III.

The District Court apparently based its dismissal of these suits solely on their asserted conflict with the Eleventh Amendment. Several of the cases cited by the District Court, however, dealt with the personal immunity of public officials rather than the Eleventh Amendment or sovereign immunity. Whereas the District Court may thus have merely confused the concepts of personal immunity and sovereign immunity as the latter is incorporated in the Eleventh Amendment, the majority expressly holds that the present suits are barred not only by the Eleventh Amendment but also by the common law doctrine of executive immunity.

Section 1983 contains no provision which can be construed as establishing immunity for any defendants thereunder.²

² The question of whether common law immunities are applicable to suits under Section 1983 is, of course, governed by federal or

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 43

As was observed by the Court of Appeals for the Second Circuit in *Jobson v. Henne*, 355 F.2d 129, 133 (2d Cir. 1966):

"The Civil Rights Acts in general, and § 1983 in particular, are cast in terms so broad as to suggest that in suits brought under these sections common law doctrines of immunity can never be a bar."

Reflecting upon the common law immunities which were firmly established prior to the enactment of Section 1983, however, the Supreme Court has imparted immunity to two specific classes of public officials who might otherwise be liable under this statute for their official acts. In *Tenney v. Brandhove*, 341 U.S. 367 (1951), the Supreme Court held that "[t]he privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings," with its "taproots in the parliamentary struggles of the Sixteenth and Seventeenth Centuries," was not abridged by the Civil Rights Act of 1871. 341 U.S. at 372. Therefore, members of a senate committee of the California Legislature were held to be immune from suit under 8 U.S.C. §§ 43 and 47(3) [now 42 U.S.C. §§ 1983 and 1985(3)]. And in *Pierson v. Ray*, 386 U.S. 547 (1967), the Supreme Court held that Section 1983 did not abrogate the well established common law doctrine of "immunity of judges from liability for damages for acts committed within their judicial jurisdiction." 386 U.S. at 554.

Beyond the immunity for legislators and judges which the Supreme Court has expressly recognized under Section 1983, there exists no authority for lower federal courts to further restrict the statute by applying common law notions of executive immunity to suits brought thereunder. The common law

general common law rather than state law. *Nelson v. Knorr*, 256 F.2d 312, 314 (6th Cir. 1958). In contrast to Part V of this dissent, which deals with the state law wrongful death actions, the present discussion does not require that we look to the common law and statutory immunities which Ohio might afford to Defendants-Appellees.

doctrine of executive immunity is at odds with the purpose or, more accurately, the very existence of Section 1983 as a remedy against deprivations of constitutional rights. In holding that the doctrines of legislative and judicial immunity are applicable to suits under Section 1983, the Supreme Court emphasized that these common law doctrines were firmly established in England and this country when Congress enacted the Civil Rights Act of 1871. The Supreme Court therefore reasoned that Congress would not have intended to abrogate these immunities under Section 1983 without expressly so providing:

"We cannot believe that Congress — itself a staunch advocate of legislative freedom — would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." *Tenney v. Brandhove*, *supra*, 341 U.S. at 376.

"The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine." *Pierson v. Ray*, 386 U.S. at 554-55.

The doctrine of executive immunity is not so well established, having been recognized in neither England nor this Country until some 20 years after the enactment of Section 1983. See *Barr v. Matteo*, 360 U.S. 564, 581-82 (1959) (Warren, C.J., dissenting). It therefore cannot be assumed that Congress intended this doctrine to apply to suits under Section 1983.

Another compelling reason for not applying a doctrine of executive immunity in suits under Section 1983 lies in the simple fact that such a doctrine, if added to the legislative and judicial immunity presently recognized under the statute, would totally circumscribe the remedy provided in Section 1983. It is difficult to envision what, if any, remedy would remain under Section 1983 if, in addition to those persons who

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 45

can bring themselves under legislative or judicial immunity, the broad class of persons who might be characterized as state executive officials is also immune from suit under the statute. Whereas Congress may have intended that the doctrines of legislative and judicial immunity would apply to suits under Section 1983, I assume that Congress did not intend that the remedy under the statute would be so thoroughly frustrated, or in effect nullified, by the additional common law doctrine of executive immunity. The rule that statutes in derogation of the common law must be narrowly construed certainly does not require, nor authorize, courts to apply a common law doctrine which totally undercuts the statute — particularly when that common law doctrine was not yet recognized when the statute was enacted.

The majority relies on the case of *Martone v. McKeithen*, 413 F.2d 1373 (5th Cir. 1969), and the cases cited therein, in support of its conclusion that the present suits are barred by the doctrine of executive immunity. In *Martone* the Court of Appeals held that the Governor of Louisiana was immune from a damage suit³ under Section 1983 for acts within the sphere of his executive activity. By substituting "the immunity of public officers from suit" within the following discussion

³ Significantly, the *Martone* Court remanded the case for further proceedings on the appellant's claim for injunctive relief against all defendants. That Court was thus of the view that the immunities which it broadly applied barred only suits for damages under Section 1983. In *Nelson v. Knox*, 256 F.2d 312, 314-15 (6th Cir. 1956), this Court expressly rejected such a dichotomy between injunctive relief and damages with respect to immunity under Section 1983:

"To be sure, the present action is one for money damages rather than an injunction, but that difference does not affect the question of immunity. Indeed, the Supreme Court has pointed out that under the Civil Rights Act relief in equity should sometimes be withheld even where 'comparable facts would create a cause of action for damages.' *Stefanelli v. Minard*, 1951, 342 U.S. 117, at page 122, 72 S.Ct. 118, 121, 96 L.Ed. 138; see *Williams v. Dalton*, 6 Cir., 1956, 231 F.2d 646, 649; *Cobb v. City of Malden*, 1 Cir., 1953, 202 F.2d 701, 704-705." 256 F.2d at 314-15.

Compare *Giles v. Harris*, 189 U.S. 475 (1903), with *Lane v. Wilson*, 307 U.S. 268 (1939). Cf. *Sterling v. Constantin*. 287 U.S. 378, 403 (1932).

of judicial immunity in *Pierson v. Ray*, 386 U.S. at 554, the *Martone* court cited that decision as support for applying a broad rule of official immunity under Section 1983:

"We do not believe that this settled principle of [the immunity of public officers from suit] was abolished by § 1983, which makes liable "every person" who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities.'" 413 F.2d at 1375.

As discussed above, such a distorted reading of *Pierson v. Ray* would result in a wholesale abolition of the remedy prescribed under Section 1983.

In support of its holding that the Governor was immune from a damage suit under Section 1983, the *Martone* Court cited *Barr v. Matteo*, 360 U.S. 564 (1959), *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), and *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964) — cases upon which the majority herein similarly relies in support of their conclusion that Defendants-Appellees are clothed with executive immunity.

In *Barr v. Matteo*, the Supreme Court held that the Acting Director of the Office of Rent Stabilization was protected by an absolute immunity from a civil action for libel arising from his issuance of an official press release. The suit was not brought under Section 1983, no deprivation of constitutional rights was asserted, nor was the defendant a person acting under color of state law. The decision therefore cannot be said to support the application of a doctrine of executive immunity in suits against state officials under Section 1983.

Gregoire v. Biddle involved a damage suit under what are now Sections 1983 and 1985, 42 U.S.C., as well as common law, against federal officials for false arrest. Holding that all defendants had absolute immunity, the District Court had dismissed the suit. The Court of Appeals affirmed the dismissal of the Section 1983 claim because none of the defen-

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 47

dants had acted "under color of" state law — not because absolute immunity was applicable to suits under the statute.⁴ 177 F.2d at 581-82. Moreover, the Court of Appeals' broad language upholding the absolute immunity of the federal defendants under the common law claims has been modified by the recent ruling in *Bivens v. Six Unknown Named Agents of the F.B.I.*, 456 F.2d 1339 (2d Cir. 1972), wherein the same Court held that F.B.I. agents were not immune from damage suits for their allegedly unreasonable search and arrest without probable cause.

In *Norton v. McShane* the plaintiffs similarly sought damages under 42 U.S.C. §§ 1983 and 1985(3) and common law from certain federal officials, including a deputy United States Marshal and his supervisors for their allegedly unlawful arrests. Applying the absolute immunity of federal officials acting within the scope of their authority, as prescribed in *Barr v. Matteo* and *Gregoire v. Biddle*, *supra*, the Court of Appeals affirmed the lower Court's dismissal of the common law actions. As in *Gregoire v. Biddle*, however, the dismissal of the action under Section 1983 was affirmed because none of the defendants had acted "under color of" state law. The question of official or executive immunity under Section 1983 therefore was not before the Court. The Court did suggest in dictum, however, that the doctrine of official immunity "may be given more limited application in those suits [under Section 1983] than it has been given at common law." 332 F.2d at 861.

Thus, none of the decisions cited by the Court in *Martone v. McKeithen* and relied on by the majority herein ruled upon the applicability of official or executive immunity to suits under Section 1983. Indeed, the same Court's opinion in *Norton v. McShane*, *supra*, recognized in dictum that the doctrine of official immunity, as applied at common law, may be given more limited application in suits under Section 1983. 332 F.2d at 861.

⁴ The *Gregoire* Court did allude to *Pickering v. Pennsylvania R.R. Co.*, 151 F.2d 240 (3d Cir. 1945), holding that absolute official immunity

Moreover, the Court of Appeals for the Fifth Circuit (which rendered both the *Martone* and *Norton* decisions, *supra*) has recently ruled in *Roberts v. Williams*, 456 F.2d 819 (5th Cir.) *cert. denied*, 404 U.S. 866 (1971), that the absolute immunity which has been afforded to federal and state officials under common law is not applicable in suits against state officials under Section 1983. 456 F.2d at 830-31. There a 14-year old inmate of a Mississippi county prison farm sued the superintendent of the farm and the individual members of the county board of supervisors under Section 1983 and common law, seeking damages for a shotgun wound inflicted by a "patently incompetent" trusty guard at the farm. The District Court had dismissed the complaint with respect to the members of the board of supervisors, holding that they were immune from suit under both the Section 1983 and common law claims.⁵ While it affirmed the District Court's determination that the board members were immune from the common law actions, the Court of Appeals rejected the application of common law immunity to the claim under Section 1983. Significantly, the *Roberts* Court acknowledged that absolute common law immunity has been recognized for federal officials [citing *Barr v. Matteo* and *Norton v. McShane*, *supra*], but it ruled that such immunity cannot operate to bar suits against state and local officials (other than judges and legislators) under Section 1983.⁶ *Id.* See also *Alexander v. Nossner*, 438

does not apply to actions under Section 1983, but found it unnecessary to consider this point. 177 F.2d at 581-82.

⁵ The District Court had found the superintendent of the county farm liable in damages under both Section 1983 and state common law. 302 F.Supp. 972 (N.D. Miss. 1969). On appeal, the superintendent simply challenged the sufficiency of the evidence to support this judgment, and he did not assert that either action was barred by his official immunity. The Court of Appeals affirmed the judgment against him under both the federal and common law claims.

⁶ The Court of Appeals did ultimately affirm the dismissal of the Section 1983 action against the board members because no breach of duty or nonfeasance on their part had a causal relation to the plaintiff's injuries — but not because the board members were immune from suit.

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 49

F.2d 183, 200-02 (5th Cir. 1971), *modified on other grounds*, 456 F.2d 835 (en banc) (police chief, fire chief, and prison warden had no common law official immunity under Section 1983); *Carter v. Carlson*, 447 F.2d 358, 365 (D.C. Cir. 1971) *cert. granted sub nom. District of Columbia v. Carter*, 404 U.S. 1014 (1972) (rejecting common law official immunity as a bar to suits under Section 1983 against a police captain and a police chief); *McLaughlin v. Tilendis*, 398 F.2d 287, 290 (7th Cir. 1971) (superintendent of schools and elected members of school board were not protected by common law, official immunity in a damage suit under Section 1983); *Sostre v. McGinnis*, 442 F.2d 178, 205 n.51 (2d Cir. 1971) (state administrative officials were not entitled to immunity from damage judgment which has been extended to judges and legislators under Section 1983).

I likewise conclude that the common law doctrines of executive and official immunity, as recognized in *Barr v. Matteo* and *Gregoire v. Biddle*, *supra*, are inapplicable in suits against state officials under Section 1983. This is the only result which averts judicial repeal of the remedy which Congress has expressly provided under that statute — a statutory remedy which the *Barr v. Matteo* and *Gregoire v. Biddle* courts did not have to consider when they gave recognition to their respective rules of common law, personal immunity.

In reaching this conclusion I am not unmindful of the policy considerations which support the recognition of a general rule of official immunity outside the context of suits under Section 1983. This policy was set forth by Judge Learned Hand in *Gregoire v. Biddle*, *supra*, 177 F.2d at 581, discussing the absolute immunity of federal officials:⁷

"The justification for [granting absolute immunity to federal executives] is that it is impossible to know whether

⁷ But see *Bivens v. Six Unknown Named Agents of the F.B.I.*, 456 F.2d 1339 (2d Cir. 1972) where the same Court of Appeals refused to recognize the immunity of F.B.I. agents from damage suits for their allegedly unreasonable search and unlawful arrest.

the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith." 177 F.2d at 581.

See also *Barr v. Matteo*, *supra*, 360 U.S. at 571; *Norton v. McShane*, *supra*, 332 F.2d at 857-59.

However compelling such considerations may be in the context of common law suits against federal or state officials, they cannot override the remedy against state officials which Congress has expressly provided in Section 1983. That statute is one of the tools with which Congress chose to make federal courts the primary guardians against state interference with constitutional rights. See *Perez v. Ledesma*, 401 U.S. 82, 106-07 (1971) (Brennan, J., concurring in part, dissenting in part). I find no countervailing legislation through which Congress — by adopting court-made rules of personal immunity — has chosen to protect state officials from burdensome suits or to insure their freedom from inhibitions in executing their official duties.

Moreover, the policy considerations set forth in *Gregoire v. Biddle*, as quoted above, relate to the need to protect public officials from the full gamut of common law suits to which they might otherwise be exposed. Indeed, the Supreme Court's broad pronouncements regarding executive immunity in *Barr v. Matteo*, *supra*, were rendered in the context of a simple libel suit against the defendant in that case. In contrast to the wide range of common law suits which public officials might face in the absence of broad common law immunities, Section 1983 exposes state officials to a relatively restricted class of suits — actions to redress deprivations of constitutional rights.

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 51

In this context, the policies supporting the doctrines of official or executive immunity are less persuasive. The burden upon state officials to defend against these suits — the non-meritorious as well as the meritorious — is but a small price to pay for the protection of constitutional rights. And it is a fundamental precept of this Nation that public officials should exercise the highest degree of care in discharging their duties when the constitutional rights of citizens are at stake. Moreover, it certainly cannot be said that Congress was ignorant of the burden it was placing upon state officials when it established a remedy to protect against state interference with the constitutional rights of citizens.

Nor can it be said that the conduct of a state official in discharging his discretionary duties is of such a nature that judicial review of the constitutionality of that conduct must be barred. Nowhere in the Constitution do I find that the rights guaranteed therein are to be subordinate to the need for unhampered exercise of discretion by state officials. As real as this need may be, it is not so absolute that suits under Section 1983 to redress asserted deprivations of constitutional rights by state officials must be barred in deference to it. Rather than immunizing state officials from suit under Section 1983, the discretionary nature of their conduct should relate only to the question of ultimate liability under that statute for actions which were unreasonable under the circumstances.⁸

In this respect I recognize that the actions challenged in the present complaints — to the extent that any of those actions might be shown to have been directly related to the quelling of a civil disturbance — demand the utmost in discretion

⁸ Judge Bazelon of the District of Columbia Circuit has emphasized this point in questioning the need for various doctrines of immunity in the context of common law suits. He suggests that the degree of discretion required in the performance of official duties should bear solely on the question of ultimate liability, and need not be raised as a bar to the suit. The substantive law of torts, rather than broad rules of immunity, can adequately protect public officials from liability for conduct which was reasonable under the circumstances. *Carter v. Carlson*, *supra*, 447 F.2d at 364, n.15.

52 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

and immediate judgments in the face of sudden exigencies. As discussed in Part IV of this dissent, in *Moyer v. Peabody*, 212 U.S. 78 (1909), and *Sterling v. Constantin*, 287 U.S. 378 (1932), the Supreme Court has expressly provided state officials with a permitted range of discretionary conduct in the face of civil disorders and, as to actions within that permitted range, has restricted judicial review to the narrow question of whether the state officials acted in good faith and in the honest belief that their actions were necessary to quell the disturbance. Beyond this restriction on judicial review of acts within a permitted range of discretion, neither *Moyer v. Peabody* nor *Sterling v. Constantin* established any broad rule of personal immunity for state officials acting to quell civil disorders. Such a rule of personal immunity, unrelated to whether the challenged conduct was within the range of actions justified by the circumstances, would render meaningless the language in *Sterling v. Constantin* respecting a permitted range of justifiable conduct and would directly contravene the established rule set forth in that opinion:

"What are the allowable limits of military discretion and whether or not they have been overstepped in a particular case, are judicial questions. . . . There is no ground for the conclusion that military orders in the case of insurrection have any higher sanction or confer any greater immunity." 287 U.S. at 401.

I would therefore hold that the present suits under Section 1983 are not barred by any notions of common law executive immunity. The majority's conclusion to the contrary renders Section 1983 a nullity and recognizes the state's interest in the immunity of its officials as being superior to the constitutional rights of individuals.

IV.

The majority herein — as did the District Court — relies in part on the Supreme Court's decision in *Moyer v. Peabody*, 212 U.S. 78 (1909), for the proposition that Defendants-Appellees' good faith actions in the face of a civil disorder are beyond judicial review. In that case, the Governor of Colorado had declared a county to be in a state of insurrection — presumably because of existing labor unrest and apprehension of trouble from members of the Western Federation of Miners, of which Moyer was president. Apparently by order of the Governor, members of the State's National Guard arrested Moyer and imprisoned him for a period of two and one-half months, during which time no charges were filed against him and no attempt was made to bring him before the state courts, which were in full operation during the incident.

After his release from custody, Moyer brought an action for damages against the Governor (then out of office) under R.S. § 1979 (now 42 U.S.C. § 1983), alleging that the arrest and incarceration were without probable cause, in violation of Moyer's Fourteenth Amendment rights. The Circuit Court dismissed the complaint for lack of jurisdiction.

The Supreme Court affirmed the dismissal on the ground that the complaint failed to state a claim under R.S. § 1979.

"So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief." 212 U.S. at 85.

Even if it could be said that this subjective good faith test prescribed in the *Moyer* decision sets the limits for judicial review in the present cases, that test would not support the District Court's dismissal of the present complaints. Moyer at no time asserted that the Governor's conduct was in bad faith

54 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

or that it was not directed toward the quelling of an insurrection. Rather, the parties agreed that the arrest and detention were undertaken in good faith in the face of an actual insurrection: "The facts that we are to assume are that a state of insurrection existed and that the Governor, without sufficient reason but in good faith, in the course of putting the insurrection down held the plaintiff until he thought that he safely could release him." 212 U.S. at 84.⁹

The present complaints do not stipulate that the alleged conduct of the defendants was undertaken in good faith or that it was directed at the quelling of an actual insurrection or disorder. To the contrary, the complaints assert that the action or inaction of all defendants was intentional, willful, wanton, reckless, and unjustified under the circumstances. Because the suits were dismissed on the complaints for lack of jurisdiction, no evidence was introduced to support or refute these allegations. Therefore, under the above-quoted language from the *Moyer* opinion alone, the present suits would have to be remanded for further proceedings in order to determine whether the alleged actions of the defendants, if proven, were undertaken in "good faith and in the honest belief" that they were necessary to head off an actual insurrection.

In view of the Supreme Court's subsequent decision in *Sterling v. Constantin*, 287 U.S. 378 (1932), however, it is clear that the "good faith and honest belief" test prescribed in *Moyer v. Peabody* cannot be broadly construed as a general standard of judicial review of the actions of a governor and National Guardsmen in the face of an insurrection or civil disorder. In *Sterling*, the Governor of Texas — under his

⁹ The parties in *Moyer v. Peabody* had agreed that the record of the proceedings on Moyer's earlier petition for a writ of habeas corpus in the Supreme Court of Colorado would be made part of the complaint before the federal Circuit Court. The existence of an insurrection and the Governor's good faith were established in this record and therefore were not at issue before the latter Court. 212 U.S. at 84.

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 55

declaration of martial law — had ordered the state's National Guard to seize and control privately owned oil wells in order to impose production restrictions. Finding that the evidence did not support the Governor's and National Guard officials' asserted belief that their actions were necessary to prevent a threatened insurrection, a three-judge District Court permanently enjoined the Governor and National Guard officers from enforcing their executive and military orders and otherwise interfering with the production of oil.

In upholding the three-judge Court's injunction, the Supreme Court noted that the question before it did not relate to the "permissible scope of determinations of military necessity in all their conceivable applications to actual or threatened disorder and breaches of the peace," nor did it relate to the "quelling of disturbances and the overcoming of unlawful resistance to civil authority." 287 U.S. at 401. Nonetheless, it is clear from the precise language of the *Sterling* opinion that the "good faith and honest belief" test suggested by the *Moyer v. Peabody* decision cannot stand as a general limitation on judicial review in cases where the existence of actual civil disorder or insurrection is established.

At the outset the Supreme Court in *Sterling* struck down the notion that a governor or other state official, relying on his personal views of necessity,¹⁰ may create an irrebuttable presumption — unreviewable by the courts — that his actions

¹⁰ Prior to its entry of the permanent injunction against the Governor and National Guard officers, the three-judge District Court in *Sterling* had conducted a full evidentiary hearing on the merits of the plaintiffs' claims. The Governor and a National Guard General testified that their "orders had not been issued for the purpose of affecting prices, nor even per se to limit production, but 'as acts of military necessity to suppress actually threatened war' as they believed from reports brought to them that 'unless they kept the production of oil down to within 400,000 barrels, a warlike riot and insurrection, in fact a state of war, would ensue.' . . ." 287 U.S. at 391. The District Court, however, proceeded to make the following findings from the evidence before it: "We find no warrant in the evidence for such belief. Looking at it in the light most favorable to defendants' contention, it presents nothing more than threats of violence or breaches of the peace. . . . It shows that at no time has

56 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

and those of the National Guard were justified under the circumstances:

"And when the federal court, finding his action to have been unjustified by any existing exigency, has given the relief appropriate in the absence of other adequate remedy, appellants assert that the court was powerless thus to intervene and that the Governor's order had the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.

"If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. To such a case the federal judicial power extends (Art. III, § 2) and, so extending, the court has all the authority appropriate to its exercise." 287 U.S. at 397-98.

At a later point in its opinion, the Supreme Court further assailed the defendants' assertion that their action under a

there been in fact any condition resembling a state of war, and that, unless the Governor may by proclamation create an irrebuttable presumption that a state of war exists, the actions of the Governor and his staff may not be justified on the ground of military necessity." 287 U.S. at 391-92.

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 57

proclamation of martial law "can be taken as conclusive proof of its own necessity and must be accepted as in itself due process of law":

"Appellants' contentions find their appropriate answer in what was said by this Court in *Ex parte Milligan*, 4 Wall. 2, 124, a statement as applicable to the military authority of the State in the case of insurrection as to the military authority of the Nation in time of war: 'The proposition is this: That in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will*; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States. If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules. The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law established on such a basis, destroys every guarantee of the Constitution, and effectually renders the military independent of and superior to the civil power. . . . Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.'" 287 U.S. at 402-03.

The *Sterling* Court then turned to consider the countervailing discretion which must be afforded to state officials under

58 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

their duty to suppress violence and maintain order.¹¹ Within this context, the Supreme Court discussed its earlier decision in *Moyer v. Peabody* and prescribed the limitations which must be placed on the language of that opinion:

"The nature of the power [of the Governor to call up the militia to suppress insurrection and disorder] also necessarily implies that there is a *permitted range of honest judgment as to the measures to be taken* in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace. Thus, in *Moyer v. Peabody*, *supra*, the Court sustained the authority of the Governor to hold in custody temporarily one whom he believed to be engaged in fomenting disorder, and right of recovery against the Governor for the imprisonment was denied. The Court said that, as the Governor 'may kill persons who resist,' he 'may use the milder measures of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief.' In that case it appeared that the action of the Governor had direct relation to the subduing of the insurrection by the temporary detention of one believed to be a participant,

¹¹ As discussed in Part VI of this dissent, the *Sterling* Court expressly ruled that the Governor's decision to call up the National Guard is conclusive and, in and of itself, is not subject to judicial review. See 287 U.S. at 399.

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 59

and the general language of the opinion must be taken in connection with the point actually decided. *Cohens v. Virginia*, 6 Wheat. 264, 399; *Carroll v. Carroll's Lessee*, 16 How. 275, 287; *Myers v. United States*, 272 U. S. 52, 142.

"It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions. Thus, in the theatre of actual war, there are occasions in which private property may be taken or destroyed to prevent it from falling into the hands of the enemy or may be impressed into the public service and the officer may show the necessity in defending an action for trespass. 'But we are clearly of opinion,' said the Court speaking through Chief Justice Taney, 'that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. . . . Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.' Mitchell v. Harmony, 13 How. 115, 134. See, also, United States v. Russell, 13 Wall. 623, 628. There is no ground for the conclusion that military orders in the case of insurrection have any higher sanction or confer any greater immunity." 287 U.S. at 399-401 (emphasis added).

The foregoing discussion in *Sterling v. Constantin* clearly precludes the application of the "good faith and honest belief" language of *Moyer v. Peabody* as a general standard of judicial review in suits challenging the actions of a gover-

60 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

nor and National Guardsmen even when it is established from the evidence that those actions were directly related to the quelling of a civil disorder or insurrection. As set forth in the above-quoted portion of the *Sterling* opinion, the language of *Moyer v. Peabody* relates to judicial review of those actions of state officials only when it is established that those actions were within the "permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order" As such, the *Moyer* language is simply a statement of the deference which must be given to state officials' good faith judgments and actions within a permitted range of discretionary conduct.

It is equally clear from the *Sterling v. Constantin* opinion that in no case is the permitted range of honest judgment free from objective limitations. Rather, when presented with allegations that state officials, in their efforts to quell a disorder or insurrection, have deprived persons of their constitutional rights through actions which were not justified by the exigencies of the situation, the courts can and must ascertain "the allowable limits of military discretion, and whether or not they have been overstepped in a particular case. . . . There is no ground for the conclusion that military orders in the case of insurrection have any higher sanction or confer any greater immunity." 287 U.S. at 401.

I thus find that the Supreme Court's decision in *Sterling v. Constantin* requires two levels of inquiry in suits to redress deprivations of constitutional rights by state officials whose actions are shown to have been directly related to the quelling of civil disorders or insurrections.¹² Initially the court¹³ must

¹² State officials are afforded a permitted range of good faith, discretionary measures only in the context of actions "in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance." *Sterling v. Constantin*, 287 U.S. at 400. As to any conduct which is not shown to have been directly related to the quelling of a disorder, liability under Section 1983 must be governed by general principles of tort liability. See *Monroe v. Pape*, 365 U.S. 187, 187 (1961).

¹³ For convenience, I refer to the trier of fact as the court throughout this discussion. Both levels of inquiry discussed in the text

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 61

review the circumstances surrounding any asserted deprivation of constitutional rights and determine if the conduct causing those asserted deprivations fell within the range of discretionary measures which were justified by the exigencies of the situation.

Precise standards, of course, cannot be prescribed as guides in defining the parameters of this range of discretion in any given case. Certainly the use of lethal force could seldom, if ever, fall within the range of permitted actions in the face of nothing more than a nonviolent sit-in or a peaceful protest march. At the other extreme, open violence and actual threats to human life would seemingly justify a broad range of discretionary actions, including the use of lethal force in some situations. Ultimately, "[e]very case must depend on its own circumstances." *Sterling v. Constantin*, 287 U.S. at 401.

If it is determined that the conduct of any state official was outside the range of justified actions, that official will be personally liable for any deprivations of rights resulting from his action, notwithstanding any asserted good faith or honest belief in the justification for his action. Alternatively, if it is determined that the conduct of any state officials was within the range of actions justified by the circumstances, under *Moyer v. Peabody* the second level of judicial review of that conduct must be restricted to the narrow question of the officials' "good faith and honest belief" that the actions were necessary to quell the disorder.

Personal liability will accompany any actions which, although adjudged to have been within the range of permitted conduct, are proven to have been undertaken in bad faith and/or without an honest belief that they were necessary to quell the disorder or prevent its continuance. This test,

relate to questions of fact which must be resolved by the trier of fact, be it the court or the jury working under appropriate instructions from the Court.

62 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

as prescribed in *Moyer v. Peabody*, is necessarily subjective, and the burden of proving the absence of good faith and an honest belief in necessity is therefore a difficult one in any case.

Beyond an inquiry into any allegations of bad faith and/or an absence of honest belief in necessity, a court cannot review any conduct which it has found to be within the range of actions justified under the circumstances. If the action taken was within the range of permitted measures, a court cannot review asserted errors in judgment nor consider whether a more prudent course of action might have been chosen. Rather, choices between alternative courses of action within the permitted range must be left solely to the discretion of the state officials. "[W]ithout such liberty to make immediate decisions, the power [of state officials to maintain peace] would be useless." *Sterling v. Constantin, supra*, 287 U.S. at 399-400.

I would remand the present Section 1983 suits for findings of fact respecting the nature of the alleged actions of Defendants-Appellees. As to any such actions which might be shown to have been directly related to the quelling of a civil disorder or insurrection, the trier of fact would be required to determine whether those actions fell within the permitted range of discretionary measures which were justified by the exigencies of the situation and whether those actions were undertaken in good faith and in the honest belief that they were necessary to quell the disorder.

V.

I now turn to consider the state law, wrongful death actions which, in addition to the claims under 42 U.S.C. § 1983, are asserted in each of the complaints.

Federal jurisdiction over the wrongful death actions in the *Krause* and *Miller* suits is based on diversity of citizenship,

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 63

28 U.S.C. § 1332.¹⁴ The Plaintiff-Appellant in the Scheuer suit, being a resident of Ohio, asserts her wrongful death action under the doctrine of pendent jurisdiction.

The District Court made no reference to the wrongful death actions, and the majority herein fails to discuss these actions, all three of which it erroneously characterizes as having been asserted under the doctrine of pendent jurisdiction. Although entertainment of the pendent claim in the Scheuer complaint rested upon the District Court's discretion in the interest of judicial economy, convenience, and fairness to the parties, *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), the wrongful death claims asserted in the Krause and Miller complaints were necessarily before the District Court under its original, diversity jurisdiction. It is therefore necessary to consider whether the wrongful death actions asserted in the Krause and Miller complaints are barred by the Eleventh Amendment and/or the common law doctrine of executive or personal immunity espoused by the majority herein.

I have concluded in Part II above that the claims under Section 1983 are not suits against the State of Ohio, so as to invoke the prohibition of the Eleventh Amendment. For purposes of the Eleventh Amendment's prohibition, the wrongful death actions are distinguishable from the Section 1983 claims only in that the former do not seek redress under a federal statute for an alleged deprivation of constitutional rights. Notwithstanding this distinction, the wrongful death actions are not suits against the State of Ohio so as to be barred by the Eleventh Amendment.

¹⁴ The Krause and Miller complaints state that the plaintiffs therein are residents of Pennsylvania and New York, respectively. The Krause complaint expressly invokes federal diversity jurisdiction over the wrongful death claims under 28 U.S.C. § 1332. While specifically referring only to jurisdiction under 28 U.S.C. §§ 1331 and 1343, the Miller complaint alleges facts which clearly support diversity jurisdiction over the wrongful death action therein.

64 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

Although the Supreme Court's decision in *Ex parte Young*, 209 U.S. 123 (1908), dealt with a suit in equity to enjoin a state official's execution of an assertedly unconstitutional statute, the Court's review of the scope of the Eleventh Amendment was not confined to suits seeking to vindicate the plaintiff's constitutional rights against state interference. As discussed in Part II above, as of 1908 the Eleventh Amendment had been construed as barring suits by a citizen against a state as a named defendant, against a state official for monies from a state's treasury, and against a state official when the requested relief would require specific performance of a contract by the state. See *Ex parte Young, supra*, 209 U.S. at 150-52.

Since the Supreme Court's discussion in *Ex parte Young*, the scope of the Eleventh Amendment has not been expanded so as to encompass the present wrongful death actions. See generally Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 Ga. L. Rev. 207, 230-34 (Winter 1968). Irrespective of whether a citizen's suit asserts a constitutional claim, the test under the Eleventh Amendment has consistently been whether a state is a "real, substantial party in interest." *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). See also *In re Ayers*, 123 U.S. 443 (1887). Moreover, the Supreme Court has consistently noted that the Amendment presents no bar to a citizen's suit against a state official, individually, for his wrongful acts. See *Ford Motor Co. v. Department of Treasury, supra*, 323 U.S. at 462; *Great Northern Ins. Co. v. Read*, 322 U.S. 47, 51 (1943) (quoted in Part II of this dissent).

The present wrongful death actions seek damages from the named defendants through their personal liability, as do the Section 1983 counterparts. They do not name the State of Ohio as a defendant; they do not seek monies from the State's treasury; they do not seek any type of relief under a contract with the State; nor does the State of Ohio have any cognizable

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 65

interest in these actions which could render it a real party in interest.

I therefore would hold that the wrongful death actions asserted in the three complaints — like their Section 1983 counterparts — are not suits against the State so as to invoke the Eleventh Amendment's prohibition.

Unlike the scope of the Eleventh Amendment and the applicability of doctrines of personal or executive immunity under Section 1983, the question of whether the wrongful death actions are barred by the Defendants-Appellees' personal immunity is governed by Ohio law. See *Carter v. Carlson*, 447 F.2d 358, 361-65 (D.C. Cir. 1971), *cert. granted sub. nom. District of Columbia v. Carter*, 404 U.S. 1014 (1972) (applying local, common law rules of immunity to common law tort actions, but rejecting the applicability of these rules to claims under Section 1983). Cf. *Roberts v. Williams*, 456 F.2d 819, 830 (5th Cir.) *cert. denied*, 404 U.S. 866 (1971) (applying state law in finding no liability under pendent, state law claims, but relying on federal case law in finding liability under Section 1983).

With respect to the personal, civil liability of its officials in the performance of their duties, Ohio has adopted the common law distinction between discretionary and ministerial functions and recognizes a limited immunity for officials acting within the former context. It is established in Ohio that a public official is individually liable for negligence in performing a ministerial function, but a public official, acting within the scope of his authority and in the absence of bad faith or a corrupt motive, is not individually liable for his failure to properly perform a duty involving judgment and discretion. *Gregory v. Small*, 39 Ohio St. 346 (1883); *Thomas v. Wilton*, 40 Ohio St. 516 (1884). See cases cited 44 Ohio Jur. 2d 570, n.18.

It is clear from the complaints that the alleged actions of Governor Rhodes and President White involve the exercise of

judgment and discretion within the above rule. Thus it is alleged that Governor Rhodes unnecessarily ordered the National Guard troops to duty on the Kent State Campus, permitted the troops to carry loaded weapons, permitted the troops to shoot at persons without justification, and ordered the troops to break up all assemblies, whether lawful or unlawful, and that President White failed to take any actions to control the National Guard troops on the Kent State Campus or to decrease the risk of injury and death. These actions or inactions appear to be inherently discretionary, requiring the judgment of the respective Defendants-Appellees.

It is further alleged, however, that the conduct of all Defendants-Appellees was intentional, willful, wanton, and reckless. These allegations, if proven, would establish the bad faith and/or corrupt motive necessary to remove the above-named Defendants-Appellees from the official immunity which would otherwise protect them from personal liability for their discretionary acts. Although the burden upon Plaintiffs-Appellants in proving the latter allegations would have been difficult, the District Court heard no evidence respecting these allegations and therefore could not properly dismiss the wrongful death actions as against these Defendants-Appellees.

With respect to Adjutant General Del Corso and Assistant Adjutant General Canterbury, the complaints allege that these Defendants-Appellees intentionally, willfully, wantonly, and recklessly caused and ordered inadequately trained and incapable National Guard troops to carry loaded weapons, to shoot at persons without legal justification, and to engage in actions which increased the risk of injury and death to persons on or near the campus. Beyond the generality of the last clause, these alleged actions similarly appear to be discretionary in nature, so as to invoke the limited common law immunity recognized for such actions. Again, however, the District Court could not properly dismiss the wrongful death actions as against these Defendants-Appellees without receiving evidence respecting the allegations of bad faith and/or

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 67

corrupt motive, which, if proven, would remove these parties from the common law immunity.

From the complaints alone, however, it is not clear whether the alleged actions of Defendants-Appellees Del Corso and Canterbury are asserted to have taken place at the scene of the disturbances on the Kent State campus or, alternatively, whether the alleged acts of these Defendants-Appellees assertedly took place at some point away from the scene of those disturbances. Whereas the limited common law immunity discussed above may be applicable to these Defendants-Appellees for any discretionary acts in the latter context, any actions in the former context would invoke the limited statutory immunity which the Ohio Legislature has expressly provided in O.R.C. § 5823.37:

"When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."¹⁵

From the clear language of the statute, it appears that the legislature intended to afford this limited immunity to all members of the organized militia, regardless of rank, so long as their actions fall within the terms of the statute. Therefore, if it had been established that Defendants-Appellees Del Corso and Canterbury engaged in acts encompassed by the terms of O.R.C. § 5923.37, that statute, rather than the common law immunity described above, would have governed the question of their potential liability for those acts. As clearly prescribed by O.R.C. § 5923.37, liability would have

¹⁵ O.R.C. § 5923.37 became effective September 1, 1967, along with its companion statute, O.R.C. § 5923.36, establishing a 2-year statute of limitations for any civil suit against a member of the organized militia alleging willful and wanton misconduct in actions described in § 5923.37. I am aware of no decisions which have applied either statute, and no legislative history is available.

68 *Krause, Admr., et al. v. Rhodes, et al.* Nos. 71-1622-23-24

rested for acts encompassed therein only if Plaintiffs-Appellants had been able to prove their allegations that the asserted conduct of Defendants-Appellees Del Corso and Canterbury was willful and wanton.

The alleged actions of Major Jones, Captains Martin and Srp, and the unnamed National Guardsmen¹⁶ appear to have assertedly taken place at the scene of the Kent State disturbances, within the terms of O.R.C. § 5923.37, as discussed above. Thus, it is alleged that Major Jones and Captains Martin and Srp intentionally, willfully, wantonly, and recklessly caused and ordered National Guard troops to shoot at and in the direction of persons without justification, or, alternatively, failed to restrain the troops under their command. It is alleged that the unnamed members of the National Guard intentionally, willfully, wantonly, and recklessly shot at and in the direction of persons on the Kent State Campus or, alternatively, if so ordered to shoot, that such orders were patently unjustified and illegal. Without having heard evidence respecting the allegations of intentional, willful, and wanton misconduct, the District Court could not properly dismiss the wrongful death actions as against these Defendants-Appellees.

I therefore believe that the District Court erred in dismissing the wrongful death actions set forth in the Krause and Miller complaints, which were before the Court under its original, diversity jurisdiction. These actions are not barred

¹⁶ As initially noted in this dissent, the Krause complaint names only Governor Rhodes, Adjutant General Del Corso, and Assistant Adjutant General Canterbury as defendants. As additional defendants, the Miller and Scheuer complaints name the parties referred to in the text. The Miller complaint alone names Alexander Stevenson as yet another defendant. Although the Miller complaint does not allege acts of Stevenson individually, it appears that his immunity, if any, should have been governed by the present considerations in the text.

Ultimate determination of the applicability of common law and statutory immunities to each of the named and unnamed members of the National Guard, including Defendants-Appellees Del Corso and Canterbury, should have rested upon evidence introduced during

Nos. 71-1622-23-24 *Krause, Admr., et al. v. Rhodes, et al.* 69

by the Eleventh Amendment. Moreover, the complaints sufficiently allege conduct which, if proven, would remove the respective Defendants-Appellees from the common law and statutory immunities which might otherwise bar the wrongful death actions.

VI.

One aspect of the alleged conduct of Defendant-Appellee Governor Rhodes warrants special comment. Among the alleged actions of Governor Rhodes for which redress is sought is his ordering the National Guard troops to duty on the Kent State Campus when such action was unnecessary. The Supreme Court has consistently ruled that the executive decision to call up the militia is conclusive and, in and of itself, is not subject to judicial review. This rule was reaffirmed in *Sterling v. Constantin*, 287 U.S. 378, 399 (1932), notwithstanding the Supreme Court's review of the actions of the Governor and National Guard subsequent to the call-up in that case. See Part IV of this dissent. With respect to the Section 1983 claims, Governor Rhodes' decision to order the National Guard to duty on the Kent State Campus therefore could not have been reviewed as a basis for liability. See *Morgan v. Rhodes*, 456 F.2d 608, 610-11 (6th Cir. 1972), cert. granted sub nom., *Gilligan v. Morgan*, No. 71-1553, 41 U.S.L.W. 3221 (U.S. Oct. 24, 1972). This deference which must be given to the Governor's decision to call up the Guard did not, however, preclude judicial review of his ancillary and subsequent conduct alleged in the complaints as a basis for liability under the statute. See *Sterling v. Constantin*, supra, 287 U.S. at 398-401; *Morgan v. Rhodes*, supra, 456 F.2d at 612-13.

For the reasons set forth in this dissent, I would reverse the ruling of the District Court and remand the suits for further proceedings.

JAMES RHODES, et al.,)
)
Defendants.)

CONNELL, J.

Before this court are defendants' motion to dismiss in the above-captioned cases. In *Krause v. Rhodes*, jurisdiction is predicated upon 42 U.S.C. 1983, for violation of Equal-Protection and Due Process guaranteed under the United States Constitution, and under 28 U.S.C. Sections 1331 and 1334.

This action maintains that "all defendants acted and conspired under color of statutes, ordinances, regulations, customs and usages of the State of Ohio", to violate the plaintiffs' rights to Equal Protection of the Law and Due Process of Law guaranteed under the United States Constitution."

The complaint of *Elain B. Miller, Administratrix v. James Rhodes, et al.*, also alleges jurisdiction under 42 U.S.C. Section 1983 for seeking "redress for the deprivation under color of state law of the life of Jeffrey Glenn Miller, his rights, privileges, and immunities secured by the Constitution of the United States."

The action filed by *Sarah Scheuer v. James Rhodes, et al.*, alleges violations of 42 U.S.C. Section 1983 seeking "redress of deprivation, under color of state law, of rights, privileges and immunities secured by the Constitution of the United States."

In reading the complaints in these three cases, the alleged incidents all took place at the same time under the same circumstances arising out of a confrontation between Ohio National Guard troops and students on the campus of Kent State University on May 4, 1970. In reading the complaint further, it is pointed out that all plaintiffs, except Sarah Scheuer, are residents of states other than Ohio and all defendants are residents

of the State of Ohio. These cases, being exact in allegations, jurisdiction being predicated upon Section 1983 in all cases, the defendants being the same, with few inconsequential exceptions, and the events allegedly having taken place at the same time, this Court shall rule on all the motions to dismiss at this time in this memorandum and order.

The defendant, James Rhodes, Governor of the State of Ohio, maintains that in all three actions that this Court lacks jurisdiction over the defendant in his representative capacity as a public official and agent of the sovereign State of Ohio, since this action is essentially against the State of Ohio, and no waiver of its constitutional right to sovereign immunity has been granted. Further, Governor James Rhodes maintains that nowhere in the plaintiffs' complaint does an allegation appear that any negligent, wilful or wanton act was committed by Governor James Rhodes.

The defendants, Adjutant General Sylvester Del Corso and Brigadier General Robert Canterbury, both of the Ohio National Guard, motion to dismiss the complaints in the three above-captioned cases before this court, and Robert White, President of Kent State University seeks dismissal in two of the cases, C 70-816 and C 70-859; this defendant not having been named in C 70-544. These defendants maintain that they are sued in their representative capacities as public officials and agents of the sovereign State of Ohio, and this complaint being brought against them in their representative capacities is a suit against the State of Ohio, and that this State having not consented to the suit, sovereign immunity prevents the plaintiffs from bringing this action.

The defendants, Major Harry D. Jones, Captain Raymond J. Srp and Captain John E. Martin, and all

officers and men in the Ohio National Guard, also move this court for a dismissal of the complaint in civil actions C 70-816 and C 70-859, maintaining that the court lacks jurisdiction over the subject matter. These defendants claim that they are being sued in their representative capacities as military officers and agents of the sovereign State of Ohio, and that the complaint is one in which the State of Ohio is primarily concerned and the state not having waived sovereign immunity, the case must be dismissed.

The National Guard is authorized by Ohio law under Section 5923.01 et seq., of the Ohio Revised Code. The duties of the Governor with respect to the use of the state militia are expressed in Section 5923.21 of the Ohio Revised Code. This statute gives the Governor of Ohio the power to order the organized militia into service to:

“aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia.”

Further, Section 5923.22 of the Ohio Revised Code enables the Governor to order the

“commanding officer of any regiment, battalion, company, troop or battery of the organized militia, to order his command or part thereof”

into service

“to act in aid of the civil authorities”

when there is

“tumult, mob riot, mob, or body of men acting together with intent to commit a felony, or to do or offer violence to person or property or by force or violence break or resist the laws of the state.”

Section 5923.37 of the Ohio Revised Code provides immunity for members of the state militia

"when a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."

The Eleventh Amendment to the United States Constitution states that:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state."

The United States Supreme Court stated in *Missouri v. Fiske*, 290 U.S. 18, 25 (1933), that;

"The Eleventh Amendment is an explicit limitation of the judicial power of the United States . . . (quoting the Eleventh Amendment) . . . However important that power, it cannot extend into the forbidden sphere. Considerations of convenience open no avenue of escape from the restriction. The 'entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given.' *Ex parte New York*, 256 U.S. 490, 497. Such a suit cannot be entertained upon the ground that the controversy arises under the Constitution or laws of the United States. *Hans v. Louisiana*, 134 U.S. 1, 10; *Palmer v. Ohio*, 248 U.S. 32, 34; *Duhne v. New Jersey*, 25 U.S. 311, 313, 314."

In the case of *Ford Motor Co. v. Department of Treasury of Indiana, et al.*, 323 U.S. 459 (1945), the Supreme Court again affirmed the law in *Fiske* and stated:

"the express constitutional limitation denies to the federal courts authority to entertain a suit brought by private parties against a state without its consent." (Citations omitted.)

In *Flitts v. McGhee*, 172 U.S. 516 (1898), the court reaffirmed the Eleventh Amendment prohibition of court interference with a state's sovereignty in a lawsuit brought by a citizen of the state. The court in the *Louisiana v. Jumel*, 107 U.S. 711 (1882), decision affirmed the sovereignty of a state in an unconsented lawsuit brought by a citizen of another state. These stated principles were reaffirmed by the Supreme Court in *Parden v. Terminal Railway of the Alabama State Docks Department, et al.*, 377 U.S. 184, 106 (1964). The Court in deciding whether a waiver of immunity had taken place stated clearly;

"Nor is a state divested of its immunity on the mere ground that the case is one arising under the Constitution or laws of the United States."

In *Fowler v. United States*, 258 F. Supp. 638 (D.C. Cal. 1966), the court in interpreting sovereign immunity and Sections 1981, 1985, and 1988 prohibited any use of these sections as a basis of civil actions against public officers acting in their official capacities in good faith and in pursuance of federal or state law.

The case of *Tenny v. Brandhave*, 341 U.S. 367 (1951); involving a suit for damages brought in federal district court against the defendants; members of a state legislature fact finding committee. The Court in reviewing this action affirmed immunity of legislators acting within

their official capacities and affirmed the district court's dismissal of the complaint stating on page 377;

"The claim of an unworthy purpose does not destroy the privilege . . . The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motive."

In *Kenny v. Killian*, 137 F. Supp. 571, 578 (W.D. Mich. 1955), the court also reviewing Section 1983 stated;

"Congress by its enactment in the reconstruction period never intended that it should be used as a basis for civil actions for damages against judges, prosecuting attorneys, sheriffs, prison wardens, and other public officers acting in their official capacities in good faith and in pursuance of State law."

See also *Copley v. Sweet*, 133 F. Supp. 502, 509 (W.D. Mich. 1955).

The basis for this principle is to permit those whose position in government compels action to proceed without hesitation in the "constant dread of retaliation." See *Gregorie v. Biddle*, 177 F.2d 579, 581 (C.A. 2nd 1949), *Bradley v. Fisher*, 13 Wall. 334; *Randall v. Brigham*, 7 Wall. 523, *Spaulding v. Vilas*, 161 U.S. 483.

The policy for affording this immunity to public officials, is further stated in *Fowler, supra*, and *Gregorie, supra*, these cases being federal officials; the *Fowler* court said of page 646,

"The well established principles of law summed up in the phrase, 'doctrine of sovereign immunity', stands as an unalterable and impregnable barrier between plaintiff and any injunctive relief against this defendant."

In *Gregorie, supra*, Judge L. Hand also stated on page 580;

"The immunity is absolute and is grounded on principles of public policy."

In *Dunn v. Estes*, 117 Supp. 146 (1953), the district court held that Section 1983 does not destroy the immunity of public officials acting in the performance of their official duties. In *Fowler, supra*, 646, the court does not acknowledge "persons" as used in 42 U.S.C. Section 1983 as including a "state or its governmental subdivision, acting in its *sovereign*, as distinguished from its proprietary, capacity." The State while acting in its sovereign capacity is not included within the purview of Section 1983, Title 28 U.S.C. See *Hewitt v. City of Jacksonville*, 188 F.2d 423 (1951), cert. den. 342 U.S. 835 (1951). The state subdivisions, city and county, are not a "person" within the meaning of Section 1983 and are immune from liability. *Sires v. Cole*, 320 F.2d 877 (1963); *Monroe v. Pape*, 365 U.S. 167 (1960).

The plaintiffs may not avoid sovereign immunity by naming individuals rather than the political division itself. In *Great Northern Ins. Co. v. Read*, 328 U.S. 47, 51 (1943), the Supreme Court stated;

"This ruling that a state could not be controlled by courts in the performance of its political duties through suits against its officials has been consistently followed. (citations omitted) ... A state's freedom from litigation was established as a constitutional right through the Eleventh Amendment."

In *Ford Motor Co. v. Department of Treasury of Indiana, supra*, 464, the Court said:

"We have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding."

The plaintiffs have cited cases where Section 1983 has been used as a basis for recovery against public officials. In *Monroe v. Pape, supra*, the Supreme Court permitted the use of Section 1983 as a basis for recovery against police officers for alleged violations of an individual's Fourteenth Amendment rights. The Court in this instance determined that sufficient allegations of "an officials abuse of his position" were presented.

In *Moyer v. Peabody*, 212 U.S. 78 (1909), Mr. Justice Holmes affirmed the order of a federal court in Colorado dismissing a lawsuit filed against the Governor of Colorado, the Adjutant General of the National Guard of that state, and a captain of a company of the militia, pursuant to R.S. Section 1979, 42 U.S.C. Section 1983, for alleged violations of the plaintiffs' Fourteenth Amendment rights. The governor in this case declared a county to be in a state of insurrection and called out the National Guard to suppress the trouble. In the course of controlling the outbreak, the plaintiff was arrested as a leader of the tumult and detained until he could be released with safety and turned over to the civil authorities and dealt with according to law. In upholding the Governor's actions, the High Court stated on page 85;

"So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief... Public danger warrants the substitution of executive process for judicial process. See *Keely v. Sanders*, 99 U.S. 441, 446... It is enough that in our opinion the declaration does not disclose a 'suit authorized by law to be brought to redress the deprivation of any right secured by the Constitution of the United States.' " See *Dow v. Johnson*, 100 U.S. 158.

The members of the Ohio National Guard are agents of the State of Ohio while acting in their official capacities. This definition of the law was affirmed in *Maryland, et al. v. United States*, 38; U.S. 41 (1965). In this instance the Court defined the state militia as being state employees. U.S. Const., Art. I, Section 8, cl. 15 and 16.

Furthermore, the law of the State of Ohio, Section 2923.55 of the O.R.C., holds all law enforcement officers and members of the organized militia guiltless for their acts in suppressing riot when such order to cease and desist has been issued pursuant to O.R.C. 2923.51.

The State of Ohio has established Kent State University pursuant to Section 3341.01 of the Ohio Revised Code. The board of trustees of this university, with the advice and consent of the senate, are responsible for the governing of this institution pursuant to Section 3341.02 of the Ohio Revised Code. Authorization is given to the trustees of the institution pursuant to Ohio Revised Code, Section 3341.01 to;

"Do all things necessary for the proper maintenance and successful and continuous operation of such universities."

Individuals may not maintain an action against a sovereign where consent has not been obtained. See *Palmer v. Ohio*, 248 U.S. 32 (1918) and also Article I, Section 16 of the Ohio Constitution as interpreted in *Randabough v. State*, 96 Ohio St. 513 (1916); *State ex rel. Williams v. Colonder*, 148 Ohio St. 188, (1947); *Wolfe v. Ohio State University Hospital*, 170 Ohio St. 49 (1959).

In *Corbean v. Xenia City Board of Education*, 366 F.2d 480 (C.A. 6th, 1966) the court affirmed the dismissal of a tort action brought in federal court against a local school board and stated;

"It is the law of Ohio that a school board, when discharging a governmental function, is protected from tort liability by the doctrine of sovereign immunity. (citations omitted) . . . The decisions of the Ohio Courts in this litigation reaffirm the adherence to the doctrine of sovereign immunity, and found it applicable here. We follow Ohio law in this tort action unless such law offends federal law or the United States Constitution. *Erie R.R. v. Tomkins*, 304 U.S. 64, (1938); *Williams v. Kaiser*, 323 U.S. 471, (1945); *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, (1940)."

As stated in *Moyer, supra*, p. 83,

"It is admitted as it must be, that the Governor's declaration that a state of insurrection existed is conclusive of the fact . . ."

And in Justice Holmes' comparison of a Governor to the Captain of a ship, the Court said on page 85;

"But even in that case great weight is given to his determination and the matter is to be judged on the facts as they appeared then and not merely in the light of the event. (citations omitted)."

The Eleventh Amendment to the United States Constitution prohibits a suit by an individual of another state against one of the United States.

The Governor of Ohio had determined in good faith that on the basis of the facts as they appeared that riot and mob rule existed at Kent State University and this Court cannot substitute its position for that of the executive of the State of Ohio.

The question of emergency compels the Governor to act decisively in suppressing this most dangerous activity, and the citizens of Ohio so demand it.

The purpose of this Eleventh Amendment is to enable the sovereign to act without fear of lawsuit in preventing mob action. Quelling riot is the duty of the state, and its actions in preventing an unrestrained mob bent on violating the rights of its citizens is the act of the State of Ohio.

This court is mindful of the circumstances where individual officials of a state or its subdivisions have abused their power under color or law giving rise to an action under Section 1983.

The existence of riot is determined by the Governor, and when so determined, the use of the militia in discharging the executive function of law enforcement is the inherent right and duty of the sovereign.

All the individuals of the militia acting in their duties pursuant to the orders of the Governor of the State of Ohio are acting within the sovereign's capacity to enforce the law, and the Eleventh Amendment right to immunity applies to each individual acting in this capacity.

This court holds that the actions of Governor James Rhodes in calling out the National Guard pursuant to the proclamation issued was the decision of the Executive, and this federal court is without jurisdiction to review.

The law provides that the use of the militia in time of tumult is the inherent and exclusive duty of the executive alone. In this instant case, there has been no recital of any claimed factual situation tending to substantiate the plaintiffs' allegations that an abuse of this duty existed, or that conspiracy actually existed in the slightest degree between any of the defendants so named in the complaints.

The Eleventh Amendment to the United States Constitution prohibits this court from exercising jurisdiction in this case and this court so finds.

All defendants, including President White, are sued in their official capacities and sovereign immunity so extends.

The above-captioned cases are dismissed as to all defendants.

The complaints in cases C 70-544, C 70-816 and C 70-859 are dismissed at plaintiffs' cost.

IT IS SO ORDERED.

/s/

JAMES C. CONNELL, Judge
United States District Court

DATED JUNE 2nd, 1971.

Complaint**[Filed September 8, 1970]**

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

SARAH SCHEUER, :
 Administratrix of the Estate of :
 Sandra Lee Scheuer, Deceased : **C70.859**
 4559 Montrose Avenue :
 Boardman, Ohio :

Plaintiff :

v. :

COMPLAINT

JAMES RHODES, :
 Governor of the State of Ohio :
 Ohio State Capital :
 Columbus, Ohio :

SYLVESTER DEL CORSO, :
 Adjutant General of the :
 Ohio National Guard :
 Fort Hayes :
 Columbus, Ohio :

ROBERT CANTERBURY, :
 Assistant Adjutant General of :
 The Ohio National Guard :
 Fort Hayes :
 Columbus, Ohio :

**PLAINTIFF
DEMANDS A TRIAL
BY JURY**

HARRY D. JONES, :
 A Major of the Ohio National Guard :
 Fort Hayes :
 Columbus, Ohio :

JOHN E. MARTIN and :
RAYMOND J. SRP, :
 Captains of the Ohio National Guard :
 Fort Hayes :
 Columbus, Ohio :

VARIOUS OFFICERS AND ENLISTED MEN,:

Who are members of G Company, 107th
 Armored Cavalry Regiment of the Ohio :
 National Guard and A Company First :
 Battalion 145th Infantry Regiment of :
 The Ohio National Guard
 Fort Hayes :
 Columbus, Ohio :

ROBERT WHITE,

President, Kent State University :
 Kent State University :
 Kent, Ohio :

Defendants :

Plaintiff, Sarah Scheuer, by her attorneys, Nelson G. Karl and Walter S. Haffner, for her Complaint herein, alleges:

1. Plaintiff is a citizen of Ohio, residing at 4559 Montrose Avenue, Boardman, Ohio, and is the duly appointed Administratrix of the Estate of Sandra Lee Scheuer, plaintiff's daughter, who died on May 4, 1970, as a result of the actions of defendants about which plaintiff complains in this action. Plaintiff was appointed Administratrix of the Estate of Sandra Lee Scheuer on August 5, 1970, by the Probate Division of the Court of Common Pleas of Mahoning County, Ohio.

2. Defendant Rhodes was governor of Ohio during the period leading up to May 4, 1970, and on that date. As a result of his state office, Defendant Rhodes exercised the authority to call up, and otherwise direct the operations of, The Ohio National Guard.

3. Defendant Del Corso was Adjutant General of The Ohio National Guard during the period leading up to May 4, 1970, and on that date.

4. Defendant Canterbury was a brigadier general and Assistant Adjutant General of The Ohio National Guard during the period leading up to May 4, 1970, and on that date, and was present and in command of Ohio National Guard troops positioned in and about the Kent State University Campus on May 3, 1970.

5. Defendant Jones was a major of The Ohio National Guard during the period leading up to May 4, 1970, and on that date and was in immediate command of a contingent of Ohio National Guard troops on the Kent State University main campus on May 4, 1970.

6. Defendants Srp and Martin were captains of The Ohio National Guard during the period leading up to May 4, 1970, and on that date and were in command of contingents of Ohio National Guard troops on the Kent State University main campus on May 4, 1970.

7. Certain officers and enlisted men of The Ohio National Guard members of G Company, 107th Armored Cavalry Regiment, and A Company, 145th Infantry Regiment were under the direction of the above-named defendants and engaged in acts set forth below. (These persons will be referred to hereafter as "the unnamed Ohio National Guard Members".) The names of the unnamed Ohio National Guard Members are not now known to plaintiff. The unnamed Ohio National Guard Members will be joined as defendants as soon as their names become known to plaintiff and leave is given by this Court.

8. Kent State University was, during the period covered by this Complaint, a State University of Ohio organized pursuant to the laws of Ohio and had its main campus in the City of Kent, Portage County, Ohio.

9. Defendant White was President of Kent State University during the period leading up to May 4, 1970, and on that date.

10. Plaintiff's Decedent, Sandra Lee Scheuer, was a full-time student enrolled in Kent State University. On May 4, 1970, plaintiff's decedent was shot and killed by a bullet shot by one of the unnamed Ohio National Guard members. Prior to her death, plaintiff's decedent suffered conscious pain and suffering. At the time she was shot, plaintiff's decedent was neither engaged in a riot nor any other criminal or disruptive activity.

11. This Court has jurisdiction pursuant to Title 42, United States Code, Section 1983, and Title 28, United States Code, Sections 1343 and 1331, in that plaintiff's first claim seeks redress for the deprivation, under color of state law, of rights, privileges and immunities secured by the Constitution of the United States, and it arises under federal law, with the matter in controversy exceeding \$10,000.00 exclusive of interest and costs. All other claims are cognizable by this Court pursuant to the doctrine of pendent jurisdiction.

FIRST CLAIM

12. Defendants, acting in concert and under color of state law, subjected, and caused to be subjected, plaintiff's decedent, to the deprivation of rights, privileges and immunities secured by the Constitution and laws of the United States and the deprivation of life without due process of law, in that, as a result of their actions on May 4, 1970, and the days prior thereto, plaintiff's decedent was shot and killed on May 4, 1970, by a bullet fired by one of the unnamed national guard members.

13. Defendants in the period in question committed, among others, the following acts which effected the deprivation alleged in Paragraph 12:

(a) Defendant Rhodes, intentionally, recklessly, wilfully and wantonly ordered members of The Ohio National Guard to duty on and about Kent State University's main campus when such action was unnecessary. He engaged in rhetoric and gave Ohio National Guard officers orders which substantially increased the risk of unnecessary violence in and about Kent State University's main campus. He permitted Ohio National Guard troops in and about Kent State University's main campus to carry guns loaded with live ammunition, under circumstances in which the carrying of such loaded guns greatly increased the risk of shooting of innocent persons, and permitted them to use such guns to shoot at persons without justification. He intentionally, recklessly, wilfully and wantonly ordered members of The Ohio National Guard to break up all assemblies without regard to whether said assemblies were lawful or unlawful. Defendant Rhodes' actions exceeded the scope of his office, and if within his office, were arbitrary, reprehensible and in gross abuse of office.

(b) Defendant Del Corso intentionally, recklessly, wantonly, and wilfully ordered and caused inadequately trained and incapable Ohio National Guard troops to (1) carry guns loaded with live ammunition in and about the Kent State University's main campus, under circumstances in which the carrying of such loaded guns greatly increased the risk of shooting of innocent persons, (2) to shoot such guns at persons without legal justification, and (3) to engage in actions which increased the risk of injury and death to persons in and about Kent State University's main campus.

(c) Defendant Canterbury intentionally, recklessly, wantonly and wilfully caused and ordered inadequately trained and incapable Ohio National Guard troops to (1) carry guns loaded with live ammunition in and about Kent State University's main campus under circumstances in which the carrying of such loaded guns greatly increased the risk of shooting of innocent persons, (2) to shoot such guns at persons without legal justification, and (3) to engage in actions which increased the risk of injury and death to persons in and about Kent State University's main campus.

(d) Upon information and belief, it is alleged that Defendants Jones, Martin and Srp intentionally, recklessly, wantonly, and wilfully caused and ordered Ohio National Guard troops to shoot guns at and in the direction of persons without legal justification and to engage in actions which increased the risk of injury and death to persons in and about Kent State University's main campus. Alternatively, Defendants Jones, Martin and Srp wantonly, wilfully and recklessly failed to restrain Ohio National Guard troops under their command from shooting guns, and causing others to shoot guns, without legal justification, at and in the direction of persons on Kent State University's main campus.

(e) The unnamed Ohio National Guard members intentionally, recklessly, wantonly and wilfully shot guns at and in the direction of persons on Kent State University's main campus without legal justification and caused others to do so. Alternatively, if the unnamed Ohio National Guard members were ordered to shoot at persons on Kent State University's main campus, such orders were patently unlawful and did not legally justify shooting at or in the direction of such persons.

(f) Defendant White recklessly, wilfully and wantonly omitted to take any actions to exercise control of Ohio National Guard activities on Kent State University's main campus or to decrease the risk of injury or death there when such actions could have decreased such risk.

SECOND CLAIM

14. Plaintiff incorporates by reference the allegations of paragraph 1-13 of this Complaint.

15. Defendant Rhodes engaged in wilful and wanton misconduct and recklessly caused plaintiff's decedent to be shot and killed.

THIRD CLAIM

16. Plaintiff incorporates by reference the allegations of paragraphs 1-13 of this Complaint.

17. Defendant Rhodes negligently caused plaintiff's decedent to be shot and killed when under a legal duty not to do so.

18. Plaintiff's decedent was not contributorily negligent.

FOURTH CLAIM

19. Plaintiff incorporates by reference the allegations of paragraph 1-13 of this Complaint.

20. Defendants Del Corso and Canterbury engaged in wilful and wanton misconduct and recklessly caused plaintiff's decedent to be shot and killed.

FIFTH CLAIM

21. Plaintiff incorporates by reference the allegations of paragraphs 1-13 of this Complaint.

22. Defendants Del Corso and Canterbury negligently caused plaintiff's decedent to be shot and killed when under a legal duty not to do so.

23. Plaintiff's decedent was not contributorily negligent.

SIXTH CLAIM

24. Plaintiff incorporates by reference the allegations of paragraphs 1-13 of this Complaint.

25. Defendants Jones, Martin and Srp engaged in wilful and wanton misconduct and recklessly caused plaintiff's decedent to be shot and killed.

SEVENTH CLAIM

26. Plaintiff incorporates by reference the allegations of paragraphs 1-13 of this Complaint.

27. Defendants Jones, Martin and Srp negligently caused plaintiff's decedent to be shot and killed when under a legal duty not to do so.

28. Plaintiff's decedent was not contributorily negligent.

EIGHTH CLAIM

29. Plaintiff incorporates by reference the allegations of paragraphs 1-13 of this Complaint.

30. The unnamed Ohio National Guard members intentionally caused plaintiff's decedent to be shot and killed.

NINTH CLAIM

31. Plaintiff incorporates by reference the allegations of paragraphs 1-13 of this Complaint.

32. The unnamed Ohio National Guard members engaged in wilful and wanton misconduct and recklessly caused plaintiff's decedent to be shot and killed.

TENTH CLAIM

33. Plaintiff incorporates by reference the allegations of paragraphs 1-13 of this Complaint.

34. Defendant White negligently caused plaintiff's decedent to be shot and killed when under a legal duty to act to protect plaintiff's decedent.

35. Plaintiff's decedent was not contributorily negligent.

WHEREFORE, plaintiff prays for judgment of compensatory damages against all defendants, jointly and severally, in the amount of One Million Dollars, (\$1,000,000.00), and for punitive damages in an amount

which this Court determines is just and proper, together with the costs and disbursements of this action.

NELSON G. KARL, of the American Civil Liberties Union of Ohio, Attorney for Plaintiff

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CRAIG MORGAN

THOM DICKERSON

and

WILLIAM SLOCUM

suing individually and on

behalf of all others

similarly situated

Plaintiffs,

COMPLAINT NO. C70-961

-VS-

JAMES RHODES

Governor of Ohio

State House

Columbus, Ohio

SYLVESTER DEL CORSO

Adjutant General of The

Ohio National Guard

Fort Hayes

Columbus, Ohio

ROBERT CANTERBURY

Assistant Adjutant General

of The Ohio National Guard

Fort Hayes

Columbus, Ohio

Defendants,

Plaintiffs, by their attorney, Harold Weinstein, for their complaint herein, allege:

1. Plaintiff Morgan is a full-time student enrolled in Kent State University and is President of Kent State University's student body. Plaintiff Morgan is a resident of Columbus, Ohio.

2. Plaintiff Dickerson is a full-time student enrolled in Kent State University and is Vice-President of Kent State University's student body. Plaintiff Dickerson is a resident of Huntington, New York.

3. Plaintiff Slocum is a full-time student enrolled in Kent State University and is President Pro Tem of Kent State University's student senate. Plaintiff Slocum is a resident of Geneva, Ohio.

4. Plaintiffs bring this action in their individual capacities and also on behalf of all persons who are students of Kent State University and are, as a consequence, similarly situated. (Referred to hereafter as "other students.") The class is so large that joinder of all members is impracticable. There are questions of law and fact common to the claims of plaintiffs and those of the other students, and plaintiffs' claims are typical of those of the entire class. Defendants, and their agents, have acted, and threaten to act, toward the entire class in such a manner as to make appropriate an injunction and declaratory judgment on behalf of the entire class.

5. Defendant Rhodes is Governor of Ohio and, pursuant to his office, is Commander-in-Chief of the Ohio National Guard and has authority to call to active duty, supervise and direct, the operations of Ohio National Guard troops.

6. Defendant Del Corso is a general of the Ohio National Guard, is Adjutant General of the Ohio National Guard and directs and supervises the training, procedures and operations of the Ohio National Guard.

7. Defendant Canterbury is a general of the Ohio National Guard, is Assistant Adjutant General of the Ohio National Guard and, upon information and belief, assists Defendant Del Corso in directing and supervising the training, procedures and operations of the Ohio National Guard. Defendant Canterbury was in direct command of a contingent of Ohio National Guard troops which had been called to active duty and assigned, on or about May 2, 1970, to operate in and about the main campus of Kent State University, as set forth in greater detail below.

8. Kent State University is a State University organized and operated pursuant to the laws of Ohio and has its main campus in the City of Kent, Portage County, Ohio. From about May 1, 1970, to May 4, 1970, Kent State University was the scene of certain demonstrations and disorders, as set forth in greater detail below. Any references hereafter to events at "The Kent Campus" refer to Kent State University's main campus.

9. This Court has jurisdiction of this action pursuant to Title 42, United States Code, Section 1983 and Title 28, United States Code, Sections 1343(3) and 2201, in that plaintiffs seek to redress the deprivation, under color of State law, of rights, privileges and immunities secured by the Constitution of the United States by means of injunctive relief and a declaratory judgment.

10. On or about May 1, 1970, there occurred certain disorders in the area of the Kent campus which resulted in the imposition of a curfew by the mayor of Kent. Thereafter, demonstrations and disorders continued in and about the Kent campus.

11. On May 2, 1970, Defendant Rhodes ordered certain contingents of the Ohio National Guard to duty in and around the Kent campus under the supervision and direction of Defendants Del Corso and Canterbury. Thereafter, the Ohio National Guard troops, under the continued direction of defendants, committed certain acts which, as set forth below, deprived plaintiffs and other students of rights, privileges and immunities secured by the United States Constitution.

The actions and operating methods of the Ohio National Guard, together with a continuation of the same rules, procedures and operating methods followed by the Ohio National Guard under defendants' supervision and direction creates a substantial threat of repetition of similar acts and continues to deprive plaintiffs and other students of rights, privileges and immunities secured by the United States Constitution.

12. Specifically, plaintiffs complain of the following past and continuing acts and conditions:

(a) Defendant Rhodes prematurely ordered Ohio National Guard troops to duty in and around the Kent campus to maintain order and perform functions normally reserved to police officers at a time when there was neither an invasion nor a breakdown of civilian authority and when civilian police forces were capable of administering civilian laws and maintaining order. The displacement of civilian police under such circumstances by a military force itself deprived plaintiffs and other students of rights secured by the First and Fourteenth Amendments, in that the presence of a military force inhibited the exercise of the rights of lawful assembly, speech and association. In addition, the unnecessary use of a military force to perform the functions of civilian

police substantially increased the risk of legally unjustified killing and injuring of civilians. On May 4, 1970, members of the Ohio National Guard fired their guns into a crowd of persons on the Kent State University main campus, injuring several students and killing four. The culpable and legally unjustified shooting of unarmed civilians by Ohio National Guard troops deprived such persons of life and liberty without due process of law. Unless this court enjoins Defendant Rhodes from prematurely displacing normal civilian authority with Ohio National Guard troops, plaintiffs and other students are imminently threatened with similar deprivations of life and liberty without due process of law and further deprivation of rights secured by the First and Fourteenth Amendments to the United States Constitution as a result of the unnecessary presence of a military force in and about the Kent campus. This threat is a real one and is exacerbated by Defendant Rhodes' actions in following a pattern throughout the State of Ohio of continued and premature use of Ohio National Guard troops to displace civilian authority far in excess of the National norm.

(b) Defendants failed to adequately provide Ohio National Guard troops with specialized training in control of civilian disorders or to provide them, when assigned to the Kent campus, with adequate equipment for dealing with civilian disorders by means other than the use of deadly force when such equipment, better adapted for dealing with civilian disorders than that utilized by the Ohio National Guard troops at the Kent campus, was available. Defendants also caused and ordered Ohio National Guard troops to carry live bullets ready for firing in their guns when on duty in and about the Kent campus. The use of inadequately trained troops, their

lack of equipment adapted for control of civilian disorders, and the use by Ohio National Guard troops of guns loaded with live bullets to control civilian disorders substantially increased the risk of the injuries and killings which occurred and, therefore, the deprivations of life and liberty without due process of law which occurred on May 4, 1970. This risk remains and constitutes a real threat to plaintiffs and other students of further deprivations of life and liberty without due process of law. Defendants continue to inadequately train Ohio National Guard troops for civilian disorder control, continue to fail to equip them with adequate equipment for dealing with civilian disorders and to cause and order them to carry live bullets loaded in their guns while on duty during civilian disorders. In addition, defendants have failed to instruct and order Ohio National Guard troops to limit their use of deadly force during civilian disorders to those instances in which deadly force could lawfully be used by police officers.

(c) Defendants permitted and caused Ohio National Guard troops to (1) engage in unlawful and unjustified beatings of students in and around the Kent campus. Beatings were administered to some students by Ohio National Guard troops, in part as a result of the exercise of the rights of speech and assembly by students who were beaten, and others. Defendants also permitted and caused Ohio National Guard troops to unlawfully detain, and cause to be detained, students, some as a result of the exercise by such students, and others, of the rights of speech and assembly. These actions of defendants, and their agents, have deprived persons of liberty without due process of law constituted a direct punishment without due process of law for the exercise of rights protected by the First and Fourteenth Amendments to the United

States Constitution. Because of the past actions of defendants' agents and defendants' continued excessive use of Ohio National Guard troops to displace civilian authority during campus disorders, there remains a very real threat that plaintiffs and other students will be subjected to similar beatings and detentions in the future and thereby be deprived of the same rights. The threat of such punishment for exercise of rights protected by the First and Fourteenth Amendments inhibits and intimidates plaintiffs and other students in their exercise of such rights.

(d) Defendants caused and ordered Ohio National Guard troops to break up lawful and peaceable meetings, demonstrations and assemblies in and about the Kent campus and thereby deprived plaintiffs and other students of their rights of speech, assembly, association and petition of government. The meetings, demonstrations and assemblies broken up were, in part, protesting against the occupation of the campus by a military force. Defendants' actions violated the First and Fourteenth Amendments to the United States Constitution and substantially increased the risk of the unjustified killings and injuries which occurred on the Kent campus of May 4, 1970. They were not legitimized by the application of concepts of Martial Law, because there was neither an invasion nor breakdown of civilian authority. Moreover, to the extent that any provision of Ohio law either authorizes the imposition of Martial Law except during time of invasion or breakdown of civil authority, or authorizes a suspension of First Amendment rights as a consequence of the declaration of Martial Law, lawful or otherwise, they violate the First and Fourteenth Amendments to the United States Constitution. Defendants' past action in ordering Ohio National Guard

troops to break up lawful assemblies creates a real threat to plaintiffs and other students that, if they participate in lawful activities they will be assaulted, killed, injured or unlawfully detained by Ohio National Guard troops.

(e) Defendants, and their agents, acted in part under the authority of Section 2923.55 of the Ohio Revised Code which provides, in pertinent part, that "members of the organized militia . . . when engaged in suppressing a riot or in dispersing or apprehending rioters and after an order to desist and disperse has been issued pursuant to Section 2923.51 of the Revised Code, are guiltless for killing, maiming or injuring a rioter as a consequence of the use of such force as is necessary and proper to suppress the riot or disperse or apprehend rioters." Section 2923.55 threatens plaintiffs and other students with deprivation of life and liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution in that it authorizes the injuring, killing and maiming of rioters by Ohio National Guard members and substantially increases the risk of use of deadly force in civilian disorders, thereby threatening not only rioters but all other persons in the vicinity of civilian disorders. Section 2923.55 further invidiously discriminates against persons who might, even erroneously, be identified as a rioter during civilian disorders, on no rational basis and singles out such persons for injuring, killing or maiming. Moreover, the existence of Section 2923.55, in connection with the other violations of rights set forth in this paragraph, increases the risk of further injury and killing of students, including plaintiffs, and therefore constitutes an imminent threat of deprivation of plaintiffs, and the other students, of the rights set forth above.

13. Plaintiffs and other students have no adequate remedy at law, because of the threat that irreparable

harm, in the form of further deprivations of privileges, rights and immunities protected by the First and Fourteenth Amendments to the United States Constitution, will be effected by defendants, and Ohio National Guard troops operating under their direction, unless the relief sought in this action is granted. This controversy is neither moot nor unripe for decision, because the practices and conditions which resulted in the past violations alleged in this complaint still obtain and directly threaten plaintiffs and other members of their class.

WHEREFORE, plaintiffs request that this Court enter judgment as follows:

(a) Enjoining Defendant Rhodes, and his successors in office, from ordering Ohio National Guard troops to maintain order or replace normal police forces in and about the Kent campus except in case of actual invasion or such breakdown of civilian authority that available civilian police forces are incapable of maintaining public order and administering the laws, and declaring any contrary use of Ohio National Guard troops in and about the Kent campus to be unlawful.

(b) Enjoining Defendants Rhodes, Del Corso and Canterbury, and their successors in office, from using Ohio National Guard troops for the control of civilian disorders in and about the Kent campus unless such troops have been competently trained in techniques of civilian disorder control, have been provided with the best available non-lethal equipment for use in civilian disorder control, have been specifically ordered and instructed not to use deadly force except in the case of actual self-defense or upon persons who have actually used or threatened the use of deadly force and have been

ordered not to carry live ammunition loaded in their guns when engaged in such control of civilian disorders, and declaring the use of Ohio National Guard troops contrary to these requirements to be unlawful.

(c) Enjoining Defendants Rhodes, Del Corso and Canterbury from either ordering or permitting Ohio National Guard troops to beat plaintiffs or other students in and about the Kent campus or unlawfully detain them, and declaring any contrary acts to be unlawful.

(d) Enjoining Defendants, and their successors, from ordering or permitting Ohio National Guard troops in and about the Kent campus to break up and/or disperse peaceful meetings or assemblies or arrest persons for attending them, except that defendants may reasonably limit the place of such meetings for legitimate purposes other than to prevent their occurrence, and from declaring any suspension of the right of assembly and declaring any actions to the contrary to be unlawful.

(e) Declaring Section 2923.55 of the Ohio Revised Code to be unconstitutional and void; and

(f) Granting such other further relief as this Court deems just and proper.

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